Supreme Court, U.S.
FILED
OCT 8 - 2010
OFFICE OF THE CLERK

No. 10-493

SUPREME COURT OF THE UNITED STATES

DR. HARRY M. KATZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Petitioner Harry M. Katz, M.D., was convicted by a jury for prescribing Schedule III and IV controlled substances to patients presenting symptoms for which the prescriptions *were* indicated under § 334.106 R.S.Mo. (2006)(Intractable pain treatment physician may prescribe controlled substances for therapeutic purposes, requirements--exceptions) No one testified that any doctor or health professional found fault with any substantive diagnosis or treatment or medication prescribed by Dr. Katz. No patient of Dr. Katz testified that his treatment resulted in overdose, death, or any related type of problem. Most of the witnesses were individuals who were denied medication. The conviction was based in substantial and material part on the government expert's testimony opining that Dr. Katz' patient records were insufficient to persuade the expert that Dr. Katz' prescriptions were for a legitimate medical purpose. No expert was tendered by counsel for Dr. Katz. After his direct appeal was denied, Dr. Katz filed a motion pursuant to 28 U.S.C. § 2255 in which he pleaded, *inter alia*, ineffective assistance of counsel due to counsel's failure to investigate or call numerous available expert witnesses to provide testimony rebutting the government expert. Dr. Katz provided proffers of testimony by 3 available expert witnesses as well as irrefutable evidence that prior counsel had not investigated a key expert that would have been available, as well as evidence that the government agent committed perjury. Dr. Katz moved the District Court for an evidentiary hearing where he could prove his case. The District Court denied the motion without allowing an evidentiary hearing. The

District Court's denial appears to be predicated on that court's perception that Dr. Katz failed to prove by a preponderance of evidence that but for counsel's unprofessional errors, the jury would have found him guilty. Dr. Katz requested a Certificate of Appealability from the Court of Appeals. That court denied the request in an order which fails to provide any reasoning for the denial.

1.) Did Dr. Katz receive careful consideration and plenary processing of his claim, including a full opportunity for presentation of the relevant facts as required by this Court's decisions in *Blackledge v. Allison* and progeny?

2.) Did the lower courts err in determining that the standard of proof necessary to establish "prejudice" in claims of ineffective assistance of counsel required Dr. Katz to provide proof by a "preponderance of evidence" that, but for counsel's errors, the result of his trial would have been different?

3.) Should the Court of Appeals have provided some kind of statement of reasons or a reviewable record as to why it denied the Certificate of Appealability?

4.) Whether this Court should hear this case because the lower courts overlooked and misapprehended material facts and laws involved in Dr. Katz's case?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

More specifically, the Petitioner Dr. Harry M. Katz and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Dr. Harry M. Katz, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on 5-27-10.

OPINIONS BELOW

The 5-27-10 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision and is reprinted in the separate Appendix A to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 8-2-10. This opinion is an unpublished decision and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Eastern District Of Missouri, was entered on 6-30-05, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States Court of Appeals for the Eighth Circuit in the direct appeal in this case, was entered on 5-9-06, is reported at 445 F.3d 1023; 2006 U.S. App. LEXIS 11462 and is reprinted in the separate Appendix D to this Petition.

The prior opinion and judgment of the United States District Court for the Eastern District Of Missouri, denying Dr. Katz's motion pursuant to 28 U.S.C. § 2255, was entered on 12-7-09, is an unpublished decision reported at 2009 U.S. Dist. LEXIS 113701, and is reprinted in the separate Appendix E to this Petition.

The prior opinion and judgment of the United States District Court for the Eastern District Of Missouri, denying Dr. Katz's Request for Certificate of Appealability, was entered on 12-7-09, is an unpublished decision, and is reprinted in the separate Appendix F to this Petition.

The prior opinion and judgment of the United States Court of Appeals for the Eighth Circuit denying rehearing on direct appeal, was dated 6-15-06, is an unpublished decision and is reprinted in the separate Appendix G to this Petition.

The prior Order of the Supreme Court denying certiorari on direct appeal was dated 10-10-06, is a published decision reported at 127 S. Ct. 421; 166 L. Ed. 2d 275; 2006 U.S. LEXIS 7562 and is reprinting in the separate Appendix H to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 5-27-10. A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 8-2-10. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case

> to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

28 U.S.C. § 2255 provides, *inter alia*:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall

not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence...*Id.*

STATEMENT OF THE CASE

Petitioner Harry M. Katz, M.D., was convicted by a jury for prescribing Schedule III and IV controlled substances to patients presenting symptoms for which the prescriptions *were* indicated under § 334.106 R.S.Mo. (2006). No one testified that any doctor or health professional found fault with any substantive diagnosis or treatment or medication prescribed by Dr. Katz. No patient of Dr. Katz testified that his treatment resulted in overdose, death, or any related type of problem. Most of the witnesses were individuals who were *denied* medication. The conviction was based in substantial and material part on the subjective opinion of a government expert witness, Dr. Parran, as to what he *perceived* as the "course of professional practice" in Missouri and Parran's *speculation* as to the subjective medical purpose for which the prescriptions had been prescribed. (Transcript of Trial 3-9-05, pages 101-199); *United States v. Katz*, 445 F.3d 1023, 1027, 1031-33, 2006 U.S. App. LEXIS 11462 (8th Cir. 5-9-06). (Appendix D)

No expert was tendered by counsel for Dr. Katz.

On 6-30-05, Dr. Katz was sentenced to a term of 16 months incarceration plus 2 years supervised release, $75,000.00 fine, $17,600.00 special assessment, and $5,640.00 forfeiture for charges related to allegedly prescribing controlled substances outside the course of professional practice and not for a legitimate medical purpose. (CR 4:04-cr-00324, #157)[1]

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[1] This refers to the District Court Clerk's Record, Case 4:04-cr-00324, Entry #157.

Counsel timely filed a direct appeal. On 5-9-06, the Court of Appeals denied Dr. Katz's direct appeal. *United States v. Katz*, 445 F.3d 1023, 2006 U.S. App. LEXIS 11462 (8th Cir. 5-9-06). (Appendix D) Rehearing was denied 6-15-06. (Appendix G) A petition for Writ of Certiorari was timely filed with the Supreme Court. On 10-10-06, the Supreme Court denied that petition. *Katz v. United States*, 127 S. Ct. 421; 166 L. Ed. 2d 275; 2006 U.S. LEXIS 7562 (10-10-06). (Appendix H)

On 8-14-07, Dr. Katz filed a motion pursuant to 28 U.S.C. § 2255 with the District Court for the Eastern District of Missouri. In this motion, Dr. Katz pleaded detailed factual allegations supporting the following arguments:

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(CR 4:07-cv-01454, #1)

Dr. Katz attached extensive verified exhibits to his Section 2255 motion supporting the motion. The exhibits included proffers from Expert Witnesses who were available to testify but who were not investigated nor called by counsel. (CR 4:07-cv-01454, #1, Exhibits F-H) The exhibits included 133 patient records where Dr. Katz had determined that medication was inappropriate and had denied prescriptions. (CR 4:07-cv-01454, #1, Exhibits J) In addition to verifying[2] the material allegations of his Section 2255 motion, Dr. Katz also filed a supporting affidavit. (CR 4:07-cv-01454, #8) Based on the foregoing allegations, argument, and attached verified exhibits, Dr. Katz asked the District Court for an evidentiary hearing where he could prove his case. (CR 4:07-cv-01454, #1)

The government responded to Dr. Katz' Section 2255 motion by *conceding* that the case agent, DEA Agent Stockman, *did* make the statements to the Grand Jury as alleged by Dr. Katz (Statement of Claim, ¶8)[3]. (CR 4:07-cv-01454, #5, Page 7 of 16)

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[2] The verified allegations are, of course, entitled to be treated as an affidavit and were competent evidence in the Section 2255 proceedings. *Paters v. United States*, 159 F.3d 1043 (7th Cir. 1998) (citing *Williams v. Browman*, 981 F.2d 901, 905 (6th Cir. 1992))

[3] This paragraph pleads:

> 8.) Evidence used to persuade the Grand Jury to indict Dr. Katz included and was created by lies by DEA Agent

The government also provided a declaration by former counsel in which the attorney declared that his assistant had contacted a crucial witness, Dr. Walker, who was a member of the Missouri Board of Healing Arts and who also had personal knowledge of Dr. Katz and his practice. *The attorney declared that his assistant told him that Dr. Walker had declined to testify. This was not only 'hearsay' by the attorney, but it was* ***false*** *and was subsequently demonstrated to be* ***false*** *by Dr. Katz when Dr. Katz produced a verified copy of a letter by Dr. Walker wherein she stated,*

> "I just was not that impressed with your team. When I tried to call them and they never would call back".

(CR 4:07-cv-01454, #8, Exhibit M1)

On 12-7-09, the District Court denied the Section 2255 motion. *United States v. Katz*, 2009 U.S. Dist. LEXIS 113701 (ED MO 12-7-09). (CR 4:07-cv-01454, #14) (Appendix E) In denying the motion, the judge decided against Dr. Katz's verified documentary evidence and in favor of government *argument* that the false statement by Agent

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> William Stockman to the Grand Jury and to Glenn Bradford, the attorney for the Missouri Board of Healing Arts and to Francis Corona, the investigator for the Missouri Board of Healing Arts, that "anyone could walk into Dr. Katz's office and get anything for $40 and there would be no request for medical information and there would be no examination because there was no examination table in his office."

Stockman at the Grand Jury was close enough to the truth. *Id. United States v. Katz*, 2009 U.S. Dist. LEXIS 113701 **7-9 (ED MO 12-7-09) (Appendix E)

In denying Dr. Katz's Section 2255 motion without an evidentiary hearing, the District Court resolved a conflict between the *verified* motion, with it's *verified* exhibits and supplementary affidavit demonstrating that counsel had *not* contacted the proposed defense witness, Dr. Walker, vs. the declaration of prior counsel wherein the counsel asserted that staff *had* contacted the defense expert witness. Because of the court's '*trial by affidavit*' and denial of the evidentiary hearing, Dr. Walker's exculpatory testimony was not considered by the lower court in denying the Section 2255 motion. Dr. Walker would have been an incredibly important and persuasive witness because she was a former President of the Missouri Board of Healing Arts and she could have testified how, in fact and law, the State of Missouri construed § 334.106 R.S.Mo. (2006) and the language therein setting forth when and how a physician may prescribe controlled substances for therapeutic purposes, requirements--exceptions.

The court also denied Dr. Katz' Claim Number Two with a holding that, while Dr. Katz' other proposed expert witnesses did at least partially "refute" the expert testimony presented at trial, Dr. Katz' was not "prejudiced"[4] from his attorneys' failure to investigate or call the available expert witnesses

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[4] The District Court explicitly declined to reach the "performance" prong of *Strickland* in this claim. *United States v. Katz*, 2009 U.S. Dist. LEXIS 113701**12 (ED MO 12-7-09). (CR 4:07-cv-01454, #14)

advanced by Dr. Katz in his motion. The District Court's analysis was primarily that counsel had called Dr. Katz to act as his own expert witness although he was not so designated or qualified. Here again, the District Court's decision was a 'trial by affidavit' because the lower court decided that prior counsel's declaration that Dr. Katz had concurred in this 'strategy' was more believable than Dr. Katz's declaration that he had made no such agreement and had, in fact, repeatedly urged counsel to retain necessary and available expert witnesses. *United States v. Katz*, 2009 U.S. Dist. LEXIS 113701 **11 (ED MO 12-7-09). (Appendix E)

While the District Court couched its holding in some language of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), careful examination of the court's order demonstrates that the court appears to have used the wrong standard of proof in making this finding; i.e. it appears that the District Court's ruling of no prejudice was based on its perception that Dr. Katz had failed to establish a "preponderance of evidence" that, but for counsel's omissions, the result of the proceeding would have been different. *United States v. Katz*, 2009 U.S. Dist. LEXIS 113701 **12 (ED MO 12-7-09). (CR 4:07-cv-01454, #14) (Appendix E)

The District Court also denied Dr. Katz' Claim Number Four based on that court's perception that he had not demonstrated sufficient "prejudice". Since the Court predicated its denial of this claim on it's holding in denying Dr. Katz' Claim Number Two, here again the court appears to have used the wrong standard of proof in making this finding. *United States v. Katz*, 2009 U.S. Dist. LEXIS 113701 **16

(ED MO 12-7-09). (CR 4:07-cv-01454, #14) (Appendix E)

On 12-7-09, simultaneously with its order denying Dr. Katz' Section 2255 motion, the District Court denied a Certificate of Appealability. (CR 4:07-cv-01454, #15) (Appendix F) On 1-20-10 Dr. Katz filed a timely notice of appeal from the District Court denying the motion. (CR 4:07-cv-01454, #16)

On appeal, in a renewed Request for Certificate of Appealability to the Court of Appeals, Dr. Katz argued:

1.) A CERTIFICATE OF APPEALABILITY SHOULD ISSUE BECAUSE DR. KATZ HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL 12

1A.) THIS COURT SHOULD GRANT A CERTIFICATE OF APPEALABILITY BECAUSE THE DISTRICT COURT USED THE WRONG STANDARD OF REVIEW IN DECIDING THAT DR. KATZ WAS NOT "PREJUDICED" FROM HIS ATTORNEYS' FAILURE TO INVESTIGATE OR CALL AVAILABLE EXPERT WITNESSES.....14

1B.) THE DISTRICT COURT ALSO ERRED IN DENYING DR. KATZ' CUMULATIVE ERROR CLAIM BOTH BY IT'S IMPROPER STANDARD OF REVIEW AND BY OVERLOOKING ADDITIONAL

RECORD EVIDENCE AND CASE LAW
.....16

(Katz USCA8 Request for Certificate of Appealability 2-3-10, pages 3-4)

On 5-27-10, the Court of Appeals denied the Request for Certificate of Appealability without comment or analysis. (USCA Order 5-27-10) (Appendix A)

Dr. Katz timely filed a petition for rehearing with the Court of Appeals. This petition was also denied without comment or analysis.

Dr. Katz demonstrates within that this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD GRANT DR. KATZ'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in

> a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a-c).

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States*, 318 U.S. 332 (1943).[5] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

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[5] See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

1A.) The Lower Courts Failed To Provide Careful Consideration And Plenary Processing Of Dr. Katz's Claims, Including A Full Opportunity For His Presentation Of The Relevant Facts Of His Section 2255 Motion At An Evidentiary Hearing.

In *Blackledge v. Allison*, 431 U.S. 63; 97 S. Ct. 1621; 52 L. Ed. 2d 136 (1977), this Court held that a federal habeas corpus petitioner is entitled to careful consideration and plenary processing of his claims, including full opportunity for presentation of the relevant facts. As part of the holding, the Court held that a defendant is entitled to an opportunity to substantiate habeas claims at an evidentiary hearing where the allegations relate primarily to purported occurrences outside the courtroom and are not so vague or conclusory as to permit summary disposition. *Id.*

When a petitioner makes a motion under 28 U.S.C. § 2255, the decision to order a hearing is committed to the "sound discretion of the district court." *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3rd Cir. 1989). When making this determination, the District Court must accept as true all nonfrivolous allegations in the petition and order a hearing unless the record as a whole conclusively shows that the petitioner is entitled to no relief. *United States v. Thomas*, 221 F.3d 430, 437 (3rd Cir. 2000); *United States v. Dawson*, 857 F.2d 923, 927 (3d Cir. 1988); *United States v. Hearst*, 638 F.2d 1190, 1195; 1980 U.S. App. LEXIS 13056 **15 (9th Cir. 1980); *United States v. Schaflander*, 743 F.2d 714, 717; 1984 U.S.

App. LEXIS 18273 (9th Cir. 1984); *Blackledge v. Allison*, 431 U.S. 63, 76, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977) (§ 2254 petition); *Machibroda v. United States*, 368 U.S. 487, 495-96, 7 L. Ed. 2d 473, 82 S. Ct. 510 (1962).[6] "The standard essentially is whether

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[6] See also *United States v. Arguelles*, 78 Fed. Appx. 984; 2003 U.S. App. LEXIS 21945 (5th Cir. 2003) (evidentiary hearing required unless Section 2255 motion, files, and trial record conclusively show petitioner entitled to no relief); *United States v. Grist*, 1998 U.S. App. LEXIS 20199; 1998 Colo. J. C.A.R. 4384 (10th Cir. 1998) (evidentiary hearing required unless Section 2255 motion, files, and trial record conclusively show petitioner entitled to no relief; court cannot choose between affidavits); *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (evidentiary hearing required unless Section 2255 motion, files, and trial record "conclusively show" petitioner entitled to no relief); *Virgin Islands v. Weatherwax*, 20 F.3d 572, 573 (3rd Cir. 1994) (petitioner entitled to evidentiary hearing on ineffective assistance of counsel claim where facts viewed in light most favorable to petitioner would entitle him to relief); *Stoia v. United States*, 22 F.3d 766, 768 (7th Cir. 1994) (same); *Ciak v. United States*, 59 F.3d 296, 306-07 (2nd Cir. 1995) (same); *Shaw v. United States*, 24 F.3d 1040, 1043 (8th Cir. 1994) (same); *Nichols v. United States*, 75 F.3d 1137, 1145-46 (7th Cir. 1996) (petitioner entitled to evidentiary hearing on claim of ineffective assistance of counsel when record inconclusive on issue); *United States v. Witherspoon*, 231 F.3d 923; 2000 U.S. App. LEXIS 27778 (4th Cir. 11-6-00) (petitioner entitled to evidentiary hearing when motion presented colorable

claim and unclear whether counter affidavit disputed defendant's allegations); *Guy v. Cockrell,* 343 F.3d 348; 2003 U.S. App. LEXIS 16632 (5th Cir. 2003) (disputed issues of material fact require evidentiary hearing); *Paprocki v. Foltz,* 869 F.2d 281, 287 (6th Cir. 1989) (if there are factual issues in dispute in a section 2255 petition and the record is insufficient to enable the district court to resolve the issue of whether a claim of ineffective assistance of counsel is meritorious, the district court must hold an evidentiary hearing); *Buenoano v. Singletary,* 963 F.2d 1433; 1992 U.S. App. LEXIS 12462 (11th Cir. 1992) ("An evidentiary hearing ... is ... necessary if Buenoano's petition alleges facts that, if true, establish a right to relief.") (citing *Agan v. Dugger,* 835 F.2d 1337, 1338 (11th Cir.1987) and *Tejada v. Dugger,* 941 F.2d 1551, 1559 (11th Cir.1991)); *Ellison v. United States,* 324 F.2d 710; 1963 U.S. App. LEXIS 3595 (10th Cir. 1963); *United States v. Gonzalez,* 98 Fed. Appx. 825; 2004 U.S. App. LEXIS 10946 (10th Cir. 2004); *United States v. Malcolm,* 432 F.2d 809, 812 (2nd Cir. 1970); *Young Hee Choy v. United States,* 344 F.2d 126, 127-28 (9th Cir. 1965); *Baumann v. United States,* 692 F.2d 565; 1982 U.S. App. LEXIS 24530 **8-10 (9th Cir. 1982); *Contreras Quintero v. United States,* 33 F.3d 1133; 1994 U.S. App. LEXIS 23653 **2-3 (9th Cir. 1994) (collecting cases). *Cf. De Vincent v. United States,* 602 F.2d 1006; 1979 U.S. App. LEXIS 12875 (1st Cir. 1979) (denial of claim of unlawful indictment vacated and remanded because defendant's allegations sufficiently described violation and were not conclusively refuted by the record; Court of Appeals pointed out that the District Court "can order the government to supplement its

the movant has made specific factual allegations that, if true, state a claim on which relief could be granted ... A hearing must be granted unless the movant's allegations, when viewed against the record, do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. Schaflander*, 743 F.2d 714, 717; 1984 U.S. App. LEXIS 18273 (9th Cir. 1984) (citing *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980), *cert. denied*, 451 U.S. 938, 68 L. Ed. 2d 325, 101 S. Ct. 2018 (1981) and *Blackledge v. Allison*, 431 U.S. 63, 76, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977) and *Baumann v. United States*, 692 F.2d 565, 571, 581 (9th Cir. 1982)).

In the instant case, as set forth in the Statement of the Case, supra, Dr. Katz attached extensive verified exhibits to his Section 2255 motion supporting the motion. The exhibits included proffers from Expert Witnesses who were available to testify but who were not investigated nor called by counsel. (CR 4:07-cv-01454, #1, Exhibits F-H) The exhibits included 133 patient records where Dr. Katz had determined that medication was inappropriate and had denied prescriptions. (CR 4:07-cv-01454, #1, Exhibits J) In addition to verifying[7] the material

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answer ... it can permit discovery ... it can direct that the record be expanded ... It can order a full transcript of the grand jury minutes, if it thinks this might be illuminating"),

[7] The verified allegations are, of course, entitled to be treated as an affidavit and were competent evidence in the Section 2255 proceedings. *Paters v. United*

allegations of his Section 2255 motion, Dr. Katz also filed a supporting affidavit. (CR 4:07-cv-01454, #8) Based on the foregoing affidavit, allegations, argument, and attached verified exhibits, Dr. Katz asked the District Court for an evidentiary hearing where he could prove his case. (CR 4:07-cv-01454, #1)

The government responded to the Section 2255 motion by providing a declaration by former counsel in which the attorney declared that his assistant had contacted a crucial witness, Dr. Walker, who was a member of the Missouri Board of Healing Arts and who also had personal knowledge of Dr. Katz and his practice. *The attorney declared that his assistant told him that Dr. Walker had declined to testify. This was not only 'hearsay' by the attorney, but it was* ***false*** *and was subsequently demonstrated to be* ***false*** *by Dr. Katz when Dr. Katz produced a verified copy of a letter by Dr. Walker wherein she stated,*

> "I just was not that impressed with your team. When I tried to call them and they never would call back".

(CR 4:07-cv-01454, #8, Exhibit M1)

In denying Dr. Katz's Section 2255 motion without an evidentiary hearing, the District Court resolved a conflict between the *verified* motion, with it's *verified* exhibits and *supplementary affidavit* demonstrating that counsel had <u>not</u> contacted the proposed defense witness, Dr. Walker, against the declaration of prior counsel wherein the counsel asserted that staff <u>*had*</u> contacted the defense expert witness. Because of the court's '*trial by affidavit*' and denial of the evidentiary hearing, Dr. Walker's

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States, 159 F.3d 1043 (7th Cir. 1998) (citing *Williams v. Browman*, 981 F.2d 901, 905 (6th Cir. 1992))

exculpatory testimony was not considered by the lower court in denying the Section 2255 motion. Dr. Walker would have been an incredibly important and persuasive witness because she was a former President of the Missouri Board of Healing Arts and she could have testified how, in fact and law, the State of Missouri construed § 334.106 R.S.Mo. (2006) and the language therein setting forth when and how a physician may prescribe controlled substances for therapeutic purposes, requirements--exceptions.

The court also denied Dr. Katz' Claim Number Two with a holding that, while Dr. Katz' other proposed expert witnesses did at least partially "refute" the expert testimony presented at trial, Dr. Katz' was not "prejudiced"[8] from his attorneys' failure to investigate or call the available expert witnesses advanced by Dr. Katz in his motion. The District Court's analysis was primarily that counsel had called Dr. Katz to act as his own expert witness although he was not so designated or qualified. Here again, the District Court's decision was a 'trial by affidavit' because the lower court decided that prior counsel's declaration that Dr. Katz had concurred in this 'strategy' was *more believable* than Dr. Katz's sworn declaration that he had made no such agreement and had, in fact, repeatedly urged counsel to retain necessary and available expert witnesses. *United States v. Katz*, 2009 U.S. Dist. LEXIS 113701 **11 (ED MO 12-7-09). (Appendix E)

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[8] The District Court explicitly declined to reach the "performance" prong of *Strickland* in this claim. *United States v. Katz*, 2009 U.S. Dist. LEXIS 113701**12 (ED MO 12-7-09). (CR 4:07-cv-01454, #14)

To the extent that the District Court compared or weighed affidavits to decide which was more credible, the District Court erred as did the Court of Appeals in affirming the error. This is because material factual issues which turn upon a credibility determination of the witnesses, such as where opposing affidavits are submitted, the District Court cannot make the credibility determination by simply choosing between the affidavits without an evidentiary hearing. *Daniels v. United States,* 54 F.3d 290 (7th Cir. 1995); *Castillo v. United States*, 34 F.3d 443, 445 (7th Cir. 1994) ("[A] determination of credibility cannot be made on the basis of an affidavit."); *United States v. Stuffle*, 1997 U.S. App. LEXIS 21010 (4th Cir. 1997) (citing *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991); *United States v. Grist,* 1998 U.S. App. LEXIS 20199 (10th Cir. 1998) (citing *Machibroda v. United States*, 368 U.S. 487, 494-95 (1962) and citing *Moore v. United States*, 950 F.2d 656, 660-61 (10th Cir. 1991))[9]

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[9] See also *United States v. Chacon-Palomares,* 208 F.3d 1157, 1159 (9th Cir. 2000) (same); *Smith v. McCormick,* 914 F.2d 1153, 1170 (9th Cir. 1990) (same); *United States v. Giardino,* 797 F.2d 30, 32 (1st Cir. 1986) (same); *Lindhorst v. United States,* 585 F.2d 361, 365 (8th Cir. 1978) (same); *United States v. Broomfield,* 2002 U.S. Dist. LEXIS 318 (D KS 1-9-02) (Defendant entitled to evidentiary hearing on claim that counsel did not advise him of availability of sentence reduction under "Safety Valve", where claim supported by declaration and referred to matters outside files and records of the case). This is just as true where an affidavit is submitted by prior counsel opposing the defendant's sworn factual allegations in

To the extent that the District Court denied the Section 2255 motion without an evidentiary hearing, here again the District Court erred by failing to provide careful consideration and plenary processing of his claims, including full opportunity for presentation of the relevant facts. *Blackledge v. Allison*, 431 U.S. 63; 97 S. Ct. 1621; 52 L. Ed. 2d 136 (1977). Since the Court of Appeals simply affirmed the District Court's decision, that court also erred. *Id.*

Had Dr. Katz been allowed to put prior counsel on the witness stand at an evidentiary hearing, he could have and would have demonstrated that counsel lied when he claimed his office had investigated Dr. Walker and that she had declined to testify. Dr. Katz could have and would have demonstrated that prior counsel lied when he

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an ineffective assistance of counsel claim. *Id.* Simply stated, "[t]he district court cannot prefer the lawyer's affidavit to Appellant's verified pleadings without a hearing." *United States v. Stuffle*, 1997 U.S. App. LEXIS 21010 (4th Cir. 1997). "When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive." *Id.* (quoting *Raines v. United States*, 423 F.2d 526, 529-530 (4th Cir. 1970) (citing *Machibroda v. United States*, 368 U.S. 487 (1962); *Tyler v. United States*, 1999 U.S. App. LEXIS 13621 (6th Cir. 1999) (remanding for evidentiary hearing where defendant's claim supported solely by his affidavit which was in turn contradicted by affidavit of prior counsel); *Figueroa-Almonte v. United States*, 1990 U.S. App. LEXIS 16941 (1st Cir. 1990) (same); *United States v. Hurtado*, 2003 U.S. App. LEXIS 7894 (2nd Cir. 4-24-03) (same).

claimed he made an agreement with Dr. Katz that Dr. Katz would act as his own expert witness when he was and would have been precluded by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Dr. Katz could have and would have demonstrated that his other proffered witnesses would have provided substantial material exculpatory testimony such that he would have been able to "undermine confidence" in his trial proceedings. *Strickland v. Washington,* 466 U.S. 668, 695; 80 L.Ed.2d 674, 698; 104 S.Ct. 2052 (1984).

Based on all of the foregoing, the lower courts failed to provide careful consideration and plenary processing of Dr. Katz's claims, including a full opportunity for his presentation of the relevant facts of his Section 2255 motion at an evidentiary hearing

1B.) Lower Courts Erred In Determining That The Standard Of Proof Necessary To Establish "Prejudice" In Claims Of Ineffective Assistance Of Counsel Required Dr. Katz To Provide Proof By A "Preponderance Of Evidence" That, But For Counsel's Errors, The Result Of His Trial Would Have Been Different.

In *Porter v. McCollum*, ___ U.S. ___; 130 S. Ct. 447, 455-456; 2009 U.S. LEXIS 8377 **24-25 (11-30-09), this Court reaffirmed the standard of proof necessary to establish "prejudice" in claims of ineffective assistance of counsel by reversing a lower court ruling, just like that in Dr. Katz' case, that a defendant had not sufficiently proven "prejudice". In reversing, the Court repeated,

> "We do not require a defendant to show "that counsel's deficient conduct more likely than not altered the outcome" of his penalty proceeding, but rather that he establish "a probability sufficient to undermine [*456] confidence in [that] outcome." *Strickland*, 466 U.S., at 693-694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. [**25] This Porter has done.

Porter v. McCollum, ___ U.S. ___; 130 S. Ct. 447, 455-456; 2009 U.S. LEXIS 8377 **24-25 (11-30-09).

In the instant case, as set forth above, the District Court denied Dr. Katz' Claim Number Two with a holding that, while Dr. Katz' proposed expert witnesses did at least partially "refute" the expert testimony presented at trial, Dr. Katz' was not "prejudiced" from his attorneys' failure to investigate or call the available expert witnesses advanced by Dr. Katz in his motion. While the District Court couched its holding in some language of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), careful examination of the court's order demonstrates that the court probably used the wrong standard of proof in making this finding; i.e. it appears that the District Court's ruling of no prejudice was based on its perception that Dr. Katz had failed to establish a "preponderance of evidence" that, but for counsel's omissions, the result of the proceeding would have been different. See *United States v. Katz*, 2009 U.S. Dist. LEXIS 113701 **12 (ED MO 12-7-09). (CR 4:07-cv-01454, #14) (Appendix E) At the very least, it appears that the District Court improperly used, and the Court of Appeals affirmed, a more difficult standard of review than the *Strickland* test which required Dr. Katz to merely

"undermine confidence" in the result of the proceeding. *Porter v. McCollum*, ___ U.S. ___; 130 S. Ct. 447, 455-456; 2009 U.S. LEXIS 8377 **24-25 (11-30-09).[10]

Based on all of the foregoing, the lower courts erred in determining that the standard of proof necessary to establish "prejudice" in claims of ineffective assistance of counsel required Dr. Katz to provide proof by a "preponderance of evidence" that, but for counsel's errors, the result of his trial would have been different

1C.) The Court Of Appeals Should Have Provided Some Kind Of Statement Of Reasons And A Reviewable Record As To Why It Denied The Certificate Of Appealability For Dr. Katz.

It is well settled law that, when a District Court denies a Section 2255 motion or habeas corpus petition without providing a reviewable record, the proper procedure is for the Court of Appeals to vacate and remand such decisions to the District Court with instructions that the lower court explain its reasoning. *United States v. Edwards*, 711 F.2d 633, 634 (5th Cir. 1983); *United States v. Counts*, 691 F.2d 348, 349 (7th Cir. 1982); *United States v. Marr*, 856 F.2d 1471, 1472-73 (10th Cir. 1988); *Clisby v.*

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[10] In light of the fact that *Porter v. McCollum*, ___ U.S. ___; 130 S. Ct. 447; 2009 U.S. LEXIS 8377 (11-30-09) was handed down only a couple of days prior to the District Court's decision in this case and was never cited by the lower court, that court likely did not consider the case.

Jones, 960 F.2d 925; 1992 U.S. App. LEXIS 8906 (11th Cir. 1992).

In granting a summary judgment motion in a civil case or a motion to dismiss under Fed. R. Civ. P. 12(b), a district court is not required to explicitly detail findings and conclusions to support its decision, even though such might be helpful to a reviewing court. However, if the district court's underlying holdings would be otherwise ambiguous or unascertainable, the courts hold that the reasons for entering summary judgment should be stated somewhere in the record. The courts reason that a dismissal order that fails to disclose the district court's reasons runs contrary to the interest of judicial efficiency by compelling the appellate court to scour the record. It also increases the danger that litigants will perceive the judicial process to be arbitrary and capricious. *Couveau v. American Airlines, Inc.*, 218 F.3d 1078, 1081 (9th Cir. 2000); *Cable Elec. Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1020 (Fed. Cir. 1985) (same). *Cf. Blackledge v. Allison*, 431 U.S. 63; 97 S. Ct. 1621; 52 L. Ed. 2d 136 (1977) (a federal habeas corpus petitioner is entitled to careful consideration and plenary processing of his claims).

In Dr. Katz's case, as set forth above, the Court of Appeals simply denied his Request for Certificate of Appealability without any analysis what-so-ever.

As set forth above, a federal habeas corpus petitioner is entitled to careful consideration and plenary processing of his claims. *Blackledge v. Allison*, 431 U.S. 63; 97 S. Ct. 1621; 52 L. Ed. 2d 136 (1977). Absent a reasoned analysis by the lower courts, this Court cannot determine whether Dr.

Katz received his rights 28 U.S.C. § 2255 and the Great Writ. *Id.*

1D.) This Court Should Hear This Case Because The Lower Courts Overlooked And Misapprehended Material Facts And Laws Involved In Dr. Katz's Case.

Dr. Katz respectfully submits that the following additional errors were overlooked or misapprehended by the District Court and Court of Appeals:

A.) The phrase "red flag", used to deny Dr. Katz' direct appeal, doesn't include any "standard" to determine what is a "red flag". *United States v. Katz*, 445 F.3d 1023, 2006 U.S. App. LEXIS 11462 (8th Cir. 5-9-06).

B.) The evidence in the record did not and does not demonstrate that Dr. Katz ever wrote 30 day prescriptions. He wrote, instead, 2 week prescriptions. (CR 4:04-cr-00324, #169, pages 36, 37, 112, 114, 120, 182, 184)[11]

C.) The evidence in the record demonstrates that Dr. Katz refused prescriptions to scores of people. Exhibit J, attached to his Section 2255 motion, details 133 individual who were denied prescriptions for narcotics. (CR 4:07-cv-01454, #1, Exhibit J) Dr. Katz provided all of his records of prescriptions denied to his trial attorneys. According to Dr. Katz, this included several hundred individuals who were denied medication. The record

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[11] This is the transcript page number reflecting the PDF page number from the top of the PDF document filed with the court. The court reporter page numbers are different.

shows that Dr. Katz did not receive these records back from trial counsel even though he asked for them. (CR 4:04-cr-00324, #186) (CR 4:04-cr-00324, #197) Consequently, these additional records of prescriptions denied are not part of the filed record on appeal.

D.) Dr. Katz' attorneys' cross examination of witnesses was professionally unreasonable. (CR 4:04-cr-00324, #170, pages 140-160)

E.) *Gonzales v. Oregon*, ___ U.S. ___; 126 S. Ct. 904; 163 L. Ed. 2d 748; 2006 U.S. LEXIS 767 (2006) supports relief in Dr. Katz' case.

F.) "Intent" was never proven within the meaning of *Flores-Figueroa v. United States*, 129 S. Ct. 1886; 173 L. Ed. 2d 853; 2009 U.S. LEXIS 3305 (2009).

G.) Patients with chronic conditions are often prescribed opiate medications for years at a time. (CR 4:07-cv-01454, #1, Exhibits I-14, I-47)

H.) No one testified that any doctor or health professional found fault with any diagnosis or treatment or medication prescribed by Dr. Katz. No patient of Dr. Katz testified that his treatment resulted in overdose, death, or any related type of problem. Most of the witnesses including DEA agent Otten were denied medication and some were denied treatment.

I.) In *Lanzetta et al. v. New Jersey*, 306 U.S. 451; 59 S. Ct. 618; 83 L. Ed. 888; 1939 U.S. LEXIS 717 (1939), Justice Pierce Butler pointed out that "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

J.) In *United States v. Cardiff*, 344 U.S. 174; 73 S. Ct. 189; 97 L. Ed. 200; 1952 U.S. LEXIS 1456 (1952), Justice Douglas pointed out that, "Words which are vague and fluid ... may be as much of a trap for the innocent as the ancient laws of Caligula."

K.) Since Dr. Katz did not accept insurance, he was not required to keep insurance type or quality records. (CR 4:07-cv-01454, #1, Exhibits F)

Based on all of the the foregoing, the decision by the Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States,* 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States,* 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Eighth Circuit in Dr. Katz's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Dr. Harry M. Katz respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the denial of his Request for Certificate of Appealability and **REMAND**[12] to the lower courts with instructions that the District Court grant an evidentiary hearing wherein Dr. Katz can prove his case.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the denial of his Request for Certificate of Appealability and **REMAND** to the Court of Appeals with instructions reconsider their decision in light of *Porter v. McCollum*, ___ U.S. ___; 130 S. Ct. 447, 455-456; 2009 U.S. LEXIS 8377 **24-25 (11-30-09).

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Southfield, MI 48075
Phone: 248-552-8900

Date: _____

[12] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).

No.

SUPREME COURT OF THE UNITED STATES

DR. HARRY M. KATZ,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

COMES NOW PETITIONER Dr. Harry M. Katz and submits the attached appendix pursuant to Supreme Court Rules.

Chris Kokkinakos, Esq.
Counsel for Petitioner
17600 Northland Park Ct.
Southfield, MI 48075
Phone: 248-552-8900

Date:_____

APPENDIX A
ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED 5-27-10

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-1164

Harry Meyer Katz,

Petitioner - Appellant

v.

United States of America,

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis

(4:07-cv-01454-DJS)

JUDGMENT

Before MURPHY, MELLOY, and BENTON, Circuit Judges

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

May 27, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

APPENDIX B
JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI ENTERED 6-30-05

ENTERED JUNE 30, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
JUDGEMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA,
v.
HARRY MEYER KATZ

Case Number: S2-4:04CR324DJS
USM Number: 31100-044
Defendant's Attorney: Barry Short and Evan Reid

THE DEFENDANT:
[ ] pleaded guilty to count(s) _____

[] pleaded nolo contendere to count(s)_____ which was accepted by the court.
[x] was found guilty on count(s) 1-6, 22-31, 32, 33-43, 44-95, 96-148, 149, 150-160, and 162-192 of the second superseding indictment on March 15, 2005 after a plea of not guilty.

Title & Section: 21 U.S.C. §841(a)(1) and §846
Nature of Offense: attempting to distribute alprazolam outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 1-5
Title & Section: 21 U.S.C. §841(a)(1) and §846
Nature of Offense: attempting to distribute diazepam outside the scope of professional

practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 6
Title & Section: 21 U.S.C. §841(a)(1) and §846
Nature of Offense: distribution alprazolam outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 33, 34, 36, 38, 40, 42, 188, 190 and 192

The defendant is sentenced as provided in pages 2 through 9 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.
[] The defendant has been found not guilty on count(s)_____
[] Count(s)_____dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of imposition of Judgement: June 30, 2005

Signature of Judge
/SS/
Name and Title of Judge:

DONALD J. STOHR
UNITED STATES DISTRICT JUDGE
Date signed: June 30, 2005

ADDITIONAL COUNTS OF CONVICTION

Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: Distribution of lorazepam outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 22, 24, 26, 28 and 30
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: Distribution of propoxyphene outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 23, 25, 27, 29, 31, 35, 37, 39, 41, 43, 97, 99, 101, 103, 105
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: " " " " "
Date Offense Concluded: see page 4
Count Number(s): 107, 109, 110, 113, 115, 117, 119, 121, 123, 125, 127, 129
Nature of Offense: " " " " "
Date Offense Concluded: see page 4
Count Number(s): 131, 133, 135, 137, 139, 141 189 and 191
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: Distribution of codeine with acetaminophen outside the scope of professional practice and not for a legitimate medical purpose

Date Offense Concluded: see page 4
Count Number(s): 32
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: Distribution of hydrocodone outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 44-95 and 149
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: Distribution of diazepam outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 96, 98, 100, 102, 104, 106, 108, 111, 112, 114, 116, 118, 120
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: " " " " "
Date Offense Concluded: see page 4
Count Number(s): 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142-148
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: " " " " "
Date Offense Concluded: see page 4
Count Number(s): 150-160, and 162-187

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 16 month(s).

This term consists of a term of 16 months on each of Count 1 through 6~ 22 through 31,33 through 43, 96 through 148, 150 through 160, 162 through 192, and a term of 16 months on Counts 32, 44 through 95, and 149, ail such terms to be served concurrently.

[x] The Court makes the following recommendations to the Bureau of Prisons:

To the extent that space is available and that the defendant is qualified, it is recommended that he be allowed to serve his term of incarceration at FPC Eglin Air Force Base in Florida

[] The defendant is remanded to the custody of the United States Marshal.

[] The defendant shall surrender to the United States Marshal for this district

[] _____ on _____

[] as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[] by 2 p.m. on _____

[x] as notified by the United States Marshal.

[] as notified by the Probation or Pretrial Services Office.

MARSHALS RETURN MADE ON SEPARATE PAGE

ADDITIONAL IMPRISONMENT TERMS

DATES OFFENSES OCCURRED:

Count 1 - On or about 8/31/00
Count 2 - On or about 9/14/00
Count 3 - On or about 10/31/00
Count 4 - On or about 11/20/00
Count 5 - On or about 1/19/01
Count 6 - On or about 1/26/01
Count 22 - On or about 12/15/00
Count 23 - On or about 12/15/00
Count 24 - On or about 1/8/01
Count 25 - On or 0bout 1/82/01
Count 26 - On or about 1/26/01
Count 27 - On or about 1/26/01
Count 28 - On or about 2/12/01
Count 29 - On or about 2/12/01

Count 30 - On or about 3/5/01
Count 31 - On or about 3/5/01
Count 32 - On or about 1/10/01
Count 33 - On or about 1/10/01
Count 34 - On or about 1/31/01
Count 35 - On or about 1/31/01
Count 36 - On or about 2/9/01
Count 37 - On er about 2/9/01
Count 38 - On or about 2/27/01
Count 39 - On or about 2/27/01
Count 40 - On or about 4/8/01
Count 41 - On or about 4/8/01
Count 42 - On or about 4/23/01
Count 43 - On or about 4/23/01
Count 44 - On or about 12/18/99
Count 45 - On or about 12/27/99
Count 46 - On or about 1/2/00
Count 47 - On or about 1/9/01
Count 48 - On or about 1/15/00
Count 49 - On or about 1/22/00
Count 50 - On or about 1/30/00
Count 51 - On or about 2/5/00
Count 52 - On or about 2/29/00
Count 53 - On or about 3/22/00
Count 54 - On or about 3/30/00
Count 55 - On or about 4/11/00
Count 56 - On or about 4/25/00
Count 57 - On or about 5/2/00
Count 58 - On or about 5/8/00
Count 59 - On or about 5/16/00
Count 60 - On or about 5/22/00
Count 61 - On or about 5/28/00
Count 62 - On or about 6/3/00
Count 63 - On or about 6/9/00
Count 64 - On or about 6/25/00

Count 65 - On or about 7/15/00
Count 66 - On or about 8/6/00
Count 67 - On or about 9/17/00
Count 68 - On or about 12/15/00
Count 69 - On or about 12/26/00
Count 70 - On or about 1/5/01
Count 71 - On or about 1/10/01
Count 72 - On or about 1/19/01
Count 79 - On or about 1/24/01
Count 74 - On or about 1/30/01
Count 75 - On or about 2/5/01
Count 76 - On or about 2/10/01
Count 77 - On or about 2/16/01
Count 78 - On or about 2/21/01
Count 79 - On or about 2/27/01
Count 80 - On or about 3/4/01
Count 81 - On or about 3/9/01
Count 82 - On or about 3/17/01
Count 83 - On or about 4/1/01
Count 84 - On or about 4/6/01
Count 85 - On or about 4/14/01
Count 86 - On or about 4/19/01
Count 87 - On or about 4/25/01
Count 88 - On or about 5/6/01
Count 89 - On or about 5/22/01
Count 90 - On or about 5/27/01
Count 91 - On or about 6/10/01
Count 92 - On or about 6/22/01
Count 93 - On or about 7/3/01
Count 94 - On or about 7/8/01
Count 95 - On or about 8/9/01
Count 96 - On or about 1/22/01
Count 97 - On or about 1/22/01
Count 98 - On or about 2/5/01
Count 99 - On or about 2/5/01

Count 100 - On or about 2/19/01
Count 101 - On or about 2/19/01
Count 102 - On or about 3/5/01
Count 103 - On or about 3/5/01
Count 104 - On or about 5/5/01
Count 105 - On or about 5/5/01
Count 106 - On or about 5/22/01
Count 107 - On or about 5/22/01
Count 108 - On or about 6/4/01
Count 109 - On or about 6/4/01
Count 110 - On or about 6/14/01
Count 111 - On or about 6/26/01
Count 112 - On or about 7/10/01
Count 113 - On or about 7/10/01
Count 114 – On or about 7/24/01
Count 115 - On or about 7/24/01
Count 116 - On or about 1/3/01
Count 117 - On or about 1/3/01
Count 118 - On or about 1/16/01
Count 119 - On or about 1/16/01
Count 120 - On or about 1/30/01
Count 121 - On or about 1/30/01
Count 122 - On or about 2/13/01
Count 123 - On or about 2/13/01
Count 124 - On or about 2/27/01
Count 125 - On or about 2/27/01
Count 126 - On or about 3/13/01
Count 127 - On or about 3/13/01
Count 128 - On or about 5/1/01
Count 129 - On or about 511/01
Count 130 - On or about 5/16/01
Count 131 - On or about 5/16/01
Count 132 - On or about 5/30/01
Count 133 - On or about 5/30/01
Count 104 - On or about 6/11/01

Count 135 - On or about 6/11/01
Count 136 - On or about 7/5/01
Count 137 - On or about 7/5/01
Count 138 - On or about 7/31/01
Count 139 - On or about 7/31/01
Count 140 - On or about 8/13/01
Count 141 - On or about 8/13/01
Count 142 - On or about 1/6/01
Count 143 - On or about 2/16/01
Count 144 - On or about 3/23/01
Count 145 - On or about 5/14/01
Count 146 - On or about 6/2/01
Count 147 - On or about 6/21/01
Count 148 - On or about 8/9/01
Count 149 - On or about 1/5/01
Count 150 - On or about 1/15/01
Count 151 - On or about 2/9/01
Count 152 - On or about 3/8/01
Count 153 - On or about 4/9/01
Count 154 - On or about 5/11/01
Count 155 - On or about 6f22/01
Count 156 - On or about 7/9/01
Count 157 - On or about 7/24/01
Count 158 - On or about 8/7/01
Count 159 - On or about 1/16/01
Count t60 - On or about 2/21/01
Count 162 - On or about 4/29/01
Count 163 - On or about 8/1/01
Count 164 - On or about 1/4/00
Count 165 - On or about 1/18/00
Count 166 - On or about 2/1/00
Count 167 - On or about 2/15/00
Count 168 - On or about 3/8/00
Count 169 - On or about 3/23/00
Count 170 - On or about 4/5/00

Count 171 - On or about 4/19/00
Count 172 - On or about 5/2/00
Count 173 - On or about 5/12/00
Count 174 - On or about 5/31/00
Count 175 - On or about 6/13/00
Count 176 - On or about 6/24/00
Count 177 - On or about 7/12/00
Count 178 - On or about 7/27/00
Count 179 - On or about 8/10/00
Count 180 - On or about 8/25/00
Count 181 - On or about 9/12/00
Count 182 - On or about 10/16/00
Count 183 - On or about 11/12/00
Count 184 - On or about 12/3/00
Count 185 - On or about 12/17/00
Count 186 - On or about 5/30/01
Count 187 - On or about 6/13/01
Count 188 - On or about 7/11/01
Count 189 - On or about 7/11/01
Count 190 - On or about 7/24/01
Count 191 - On or about 7/24/01
Count 192 - On or about 8/33/01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 year(s).

This term consists of a term of I year on each of Counts 1-6, 22-31, 33-43, 96-148, 150-160, 162-192, and 2 years on each of Counts 32, 44-95, and 149, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.
[x] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)
[x] The defendant shall not possess a firearm as defined in 18 U.S.C.§ 921. (Check, if applicable)
The defendant shall coapera~ in the collectinn of DNA as directed by the probation officer, (Check. it'applicable)
[] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
[] The Defendant shall participate in an approved program for domestic violence. (Check, if applicable.)
If this judgment imposes a fine or a restitution obligation, it shah be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment
The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shah report to the probation officer and shall submit a truthful and complete wrr['ten report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the Court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall participate in a mental health program approved by the United States Probation Office. The defendant shall pay for the costs associated with the services provided based on a co-payment fee established by the United States Probation Office. Co-payments shall never exceed the total cost of services provided.

2. The defendant shall provide the United Stains Probation Office access to any requested financial information.

3. The defendant shall be prohibited from incurring new credit charges or opening additional lines of credit without the approval of the United States Probation Office so long as there is a balance on the Court-imposed financial obligation.

4. The defendant shall pay the fine as ordered by the Court,

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments on sheet 6.

Totals: Assessment: $17,600.00

Fine: $75,000.00

Restitution:

[] The determination of restitution is deferred until _____ will be entered after such a determination. *An Amended Judgment in a Criminal Case (AO 245C).*

[] The defendant shall make restitution, payable through the Clerk of Court, to the following payees in the amounts listed below.

If the defendant makes a partial payment each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant of 18 U.S.C. 3664(i) all nonfederal victims must be paid before the United States is paid.

Name of payee	Total Loss	Restitution Ordered	Priority or Percentage

Totals: _____

[] Restitution amount ordered pursuant to plea agreement __

[] The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment pursuant to 18 U,S.C, § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

The interest requirement is waived for the. [] fine and/or [] restitution.

The interest requirement for the [] fine [] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

The defendant shall pay to the United States a special assessment of $100 on each of Counts 1-6, 22-160, and 162-192, for a total of $17,600, that shall be due immediately.

The defendant shall pay to the United States a fine of $75,000 which is due in full within 30 days of this judgment. Payment of the fine is to be made to the Clerk of the Court. The defendant shall notify the U.S. Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the sum remains unpaid.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [] Lump sum payment of _____ due immediately, balance due

[] not later than _____, or

[] in accordance with [] C, [] D, or [] E below; or [] F below; or

B [] Payment to begin immediately maybe combined with [] C, [] D, or [] E below; or [] F below; or

C [] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ . (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D []Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ . (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
E [] Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after Release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
F [x] Special instructions regarding the payment of criminal monetary penalties:
See page 8 for further instructions.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program are made to the clerk of the court.
The defendant will receive credit for all payments previously made reward any criminal monetary penalties imposed.

[] Joint and Several
Defendant and Co-defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

[] The defendant shall pay the cost of prosecution.
[] The defendant shall pay the following court cost(s):

[] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal, (3) restitution interest, (4) fine principal, (5)fine interest (6) community restitution,(7) penalties, and (g) costs, including cost of prosecution and court costs.

APPENDIX C
ORDER OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED 8-2-10

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-1164

Harry Meyer Katz

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:07-cv-01454-DJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 02, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

APPENDIX D
ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED 5 9 06

United States of America, Appellee,
v.
Harry Meyer Katz, Appellant.
No. 05-2940
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
445 F.3d 1023; 2006 U.S. App. LEXIS 11462

January 13, 2006, Submitted
May 9, 2006, Filed

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by United States v. Katz, 2006 U.S. App. LEXIS 14744 (8th Cir., June 15, 2006)

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Missouri.

CASE SUMMARY:

PROCEDURAL POSTURE: A jury found defendant guilty of 176 counts of attempted or actual distribution of Schedule III and IV controlled substances outside of the scope of medical practice and not for a legitimate medical purpose in violation of 21 U.S.C.S. §§ 846 and 841(a)(1). The United States District Court for the Eastern District of Missouri sentenced him to 16 months' imprisonment, a $75,000 fine, and forfeiture of $5,640. Defendant appealed.

OVERVIEW: Defendant raised seven grounds of alleged error, none of which survived review: (1) because sufficient evidence supported defendant's conviction, the district court did not err in failing to

grant his motion for judgment of acquittal or a new trial; (2) the district court did not err in admitting evidence under Fed. R. Evid. 404(b) relating to 300 prescriptions not charged in the indictment because the evidence was relevant to show defendant's intent and its admission was not unfairly prejudicial; (3) the admission of a charged drug offender's testimony under Rule 404(b) was not an abuse of discretion because the testimony showed defendant's knowledge and intent in writing prescriptions in order to establish that he did not have a legitimate medical purpose in writing them; (4) the district court did not give erroneous jury instructions; (5) there was no abuse of discretion in allowing disputed portions of testimony from a Government expert, which was admissible under Fed. R. Evid. 704(b), to be submitted to the jury; (6) the Government's rebuttal closing argument did not deprive defendant of a fair trial; and (7) the district court did not err in failing to grant a mistrial.

OUTCOME: Defendant's conviction was affirmed.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: John T. Davis, Sirena M. Wissler, U.S. ATTORNEY'S OFFICE, St. Louis, MO.

For HARRY MEYER KATZ, Defendant - Appellant: Barry A. Short, Evan Z. Reid, LEWIS & RICE, St. Louis, MO.

HARRY MEYER KATZ, Defendant - Appellant, Pro se, Cedar Hill, MO.

JUDGES: Before SMITH and HANSEN, Circuit Judges, and BOGUE, n1 District Judge.

n1 The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, sitting by designation.

OPINIONBY: SMITH

OPINION:

[*1025] SMITH, Circuit Judge.

Dr. Harry Meyer Katz was charged in a 192-count indictment with attempted or actual distribution of Schedule III and IV controlled substances outside of the scope of medical practice and not for a legitimate medical purpose in violation of 21 U.S.C. §§ 846 and 841(a)(1). Each count of the indictment related to a single prescription written by Dr. Katz for various controlled substances, including Xanax, Darvocet, Alprazolam, Vicodin, and Valium. A jury found Dr. Katz guilty on 176 counts of the indictment, and the [**2] district court n n2 sentenced him to 16 months' imprisonment, a $ 75,000 fine, and forfeiture of $ 5,640. n n3 Dr. Katz appeals, alleging seven grounds for reversal. For the reasons set forth below, we affirm.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

n3 The forfeiture amount represents the amount of fees that Dr. Katz earned for the office visits in connection with the counts of conviction.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

I. Facts

Dr. Katz opened what could be considered an atypical medical practice in Cedar Hill, Missouri, in 1982. Dr. Katz maintained office hours seven days a

week and did not accept appointments. Dr. Katz lived in his office and was amenable to opening his doors to a patient in need at any hour. He charged a flat fee, $ 40 or $ 45, for all office visits, accepting payment in cash, check or charge; he did not accept medical insurance. Dr. Katz prescribed medications to patients upon request and was suspected of violating federal drug laws. Dr. Katz was [**3] eventually indicted based upon prescriptions he wrote for fifteen people, n n4 who all testified for the government at trial.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n4 Dr. Katz was acquitted of 15 counts relating to patients Carol and Philip Marlowe and one count relating to another patient.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

[*1026] Three of these individuals were undercover law enforcement officers sent into Dr. Katz's office, attempting to obtain a prescription for a controlled substance. Officer Mike Otten visited Dr. Katz four times, acting in an undercover capacity, and each time was equipped with an audio recording device. In each of Otten's visits, he requested a prescription for Xanax, claiming that he wanted the pills to "chill out." Dr. Katz took his blood pressure, measured his height and weight then wrote Otten a prescription for Xanax. Otten paid Dr. Katz $ 40 in cash. Officer Dawn Molkenbur also visited Dr. Katz, acting in an undercover capacity. She too requested a prescription for Xanax, telling Dr. Katz that she had used it before for personal reasons. Dr. Katz wrote her [**4] a prescription, and Molkenbur paid Dr. Katz $ 40 in cash. Lastly, undercover Officer Cynthia

Scott visited Dr. Katz, acting in an undercover capacity. Scott asked Dr. Katz for Valium, stating that she liked the way it made her feel. Dr. Katz wrote her a prescription for Diazepam (generic Valium) without conducting a medical examination. Scott paid Dr. Katz $ 40 in cash.

Daniel Seay first saw Dr. Katz in 1996. Seay testified that he suffered from back and knee pain. He also testified that he had problems with anxiety and panic attacks. Dr. Katz prescribed Seay acetaminophen with codeine for pain, Alprazolam (generic Xanax), and Propoxyphene (generic Darvocet) on his first visit to Dr. Katz's office. Dr. Katz wrote Seay over 82 prescriptions for controlled substances during the course of his treatment.

Charles Beck told Dr. Katz that he wanted medication and specifically asked for Hydrocodone (generic Vicodin), which he was immediately prescribed. Beck continued to visit Dr. Katz between 1999 and 2002, complaining of various injuries and anxiety. During this time, Dr. Katz wrote Beck a total of 117 prescriptions for controlled substances. On one occasion, Dr. Katz wrote Beck a prescription [**5] for Vicodin 9 days after he gave Beck a prescription for 30 Vicodin tablets. On another occasion, Dr. Katz wrote Beck a prescription for Vicodin 6 days after he gave Beck a prescription for 30 Vicodin tablets. On a third occasion, Dr. Katz wrote Beck a prescription for Vicodin 7 days after he gave Beck a prescription for 30 Vicodin tablets. Dr. Katz then expressed concern that Beck had a problem with Vicodin abuse, but Dr. Katz continued to prescribe it for him.

Pamela Asher went to see Dr. Katz after a car accident. She told Dr. Katz that she needed

medication, and he gave her prescriptions for Darvocet and Diazepam. Pamela Asher pretended to need medication and succeeded in getting Dr. Katz to see her every 2 weeks for 3 years, during which time she received at least 82 prescriptions for Diazepam and Darvocet. Chad Asher, Pamela's husband, first saw Dr. Katz in 1998. Chad claimed that he was having stress and anxiety and a back problem. He specifically asked Dr. Katz for Diazepam and Darvocet. Chad continued to see Dr. Katz every two weeks for the next four years. On occasion, Chad would see Dr. Katz more frequently than every 2 weeks, each time receiving a new 30-day prescription. [**6] While seeing Dr. Katz, the Ashers each received the same prescriptions for the same medications.

Dan Bowen, Jr. saw Dr. Katz for several years. Initially, Bowen talked to Dr. Katz about stress and anxiety, resulting from his father's death. Dr. Katz prescribed Xanax. Bowen also told Dr. Katz that he fell on ice and hurt his back and that he suffered from recurrent headaches. Dr. Katz prescribed Hydrocodone for the back pain and Valium for the headaches. Dr. Katz wrote Bowen a total of 51 prescriptions for controlled substances. Peggy [*1027] Sue Bowen, Dan's wife, saw Dr. Katz for four to five years. She complained of migraine headaches. Dr. Katz initially prescribed Vicodin, but the prescription was later changed to Fioricet and Valium. Over time, Dr. Katz wrote her 49 prescriptions for Valium. Angie Luechtmann, daughter of the Bowens, began receiving Diazepam prescriptions from Dr. Katz in 2001. She told Dr. Katz that she was under stress because she left her husband and her brother was in jail. She also

received Fioricet prescriptions from Dr. Katz. Dr. Katz was aware that Luechtmann was a methamphetamine user, but he continued to write at least 25 prescriptions for Diazepam. Dan Bowen [**7] III, son of the Bowens, began seeing Dr. Katz in 1999, complaining of stress, and received at least 25 prescriptions for Diazepam.

Danny Turman began seeing Dr. Katz when his surgeon refused to give him any more pain pills after a knee replacement. Turman told Dr. Katz that he had pain in his knee from the knee replacement. Dr. Katz wrote Turman a prescription for Darvocet. Turman saw Dr. Katz every two weeks for a year and a half. During that time, Dr. Katz wrote Turman at least 50 prescriptions for Darvocet and 50 for Lorazepam.

William Bradley, a college student, told Dr. Katz that he had school stress and requested a prescription for Xanax. He actually intended to use the Xanax for personal pleasure. On one occasion, Bradley told Dr. Katz that he injured himself and requested pain medication. Dr. Katz, without conducting an examination of the purported injury, prescribed Darvocet.

Maria Taca gave testimony under Federal Rule of Evidence 404(b) because her prescriptions were not charged in the indictment. At the time of trial, Taca was indicted as a part of a heroine conspiracy and was testifying against Dr. Katz in hopes of receiving a lighter [**8] sentence in connection with her own case. She testified that she began seeing Dr. Katz in 1999 to obtain Xanax. Dr. Katz prescribed Xanax and Darvocet. Taca visited Dr. Katz at least every two weeks for about three years. Sometimes, she would use an assumed name

and get additional prescriptions. During one visit, Dr. Katz told her that if she combined Soma and Librax together, they would produce the same effect as Xanax. Dr. Katz then gave her Soma and Librax prescriptions.

Each patient/witness testified that Dr. Katz required no paperwork at their initial visit. Further, Dr. Katz never asked for medical or family history. There were usually no physical examinations conducted, and Dr. Katz never referred any of these patients to a specialist or for a second opinion. All of the patient/witnesses paid Dr. Katz in cash and did not receive a receipt.

The government offered the expert testimony of Dr. Ted Parran. Dr. Parran gave the jury an overview of the doctor-patient relationship in general. Dr. Parran then addressed his review of Dr. Katz's patient charts for Charles Beck, Daniel Seay, Chad Asher and Pamela Asher. Dr. Parran testified that the prescriptions written for these four [**9] patients were outside of the scope of legitimate medical practice and without a legitimate medical purpose.

II. Discussion

Dr. Katz advances the following arguments on appeal: (1) the district court erred in failing to grant his motion for judgment of acquittal or a new trial based on the sufficiency of the evidence; (2) the district court erred in admitting evidence relating to prescriptions not charged in the indictment; (3) the district court erred in admitting the testimony of Maria Taca pursuant to Rule 404(b); (4) the district [*1028] court gave erroneous jury instructions; (5) the district court erred in allowing disputed portions of testimony from the government's expert, Dr.

Parran, to be submitted to the jury; (6) the government's rebuttal closing argument deprived him of a fair trial; and (7) the district court erred in failing to grant a mistrial following the inappropriate testimony of Chad Asher.

A. Sufficiency of the Evidence

A prosecution under § 841 requires

> proof beyond a reasonable doubt that the doctor was acting outside the bounds of professional medical practice, as his authority to prescribe controlled substances was being used not for treatment [**10] of a patient, but for the purpose of assisting another in the maintenance of a drug habit or of dispensing controlled substances for other than a legitimate medical purpose, i.e. the personal profit of the physician.

United States v. Tran Trong Cuong, 18 F.3d 1132, 1137 (4th Cir. 1994).

Dr. Katz contends that the record contained no evidence specific to 169 of the counts and insufficient evidence supports the remaining 7 counts of conviction. Dr. Katz maintains that the government relied upon inadmissible evidence calculated to mislead the jury into convicting him based on a medical malpractice standard of negligence. Specifically, Dr. Katz argues he was prejudiced by the government's lumping together all of the prescriptions written for a particular patient, which tended to negate the presumptive legality attached to each prescription. Further, Dr. Katz argues that the government must prove the doctor-patient relationship for each alleged illegal prescription.

According to Dr. Katz, evidence not connected directly to the writing of a charged prescription should have been considered irrelevant. Lastly, Katz points out that the government's expert opined as [**11] to the contents of only four patient records.

"This court reviews the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the government, with all reasonable inferences and credibility determinations made in support of the jury's verdict." United States v. Kelly, 436 F.3d 992, 996 (8th Cir. 2006). We hold that sufficient evidence supports Dr. Katz's conviction. The 192 prescriptions charged in the indictment represented 192 individual prescriptions written to 15 individuals who visited Dr. Katz. Each of these 15 individual patients testified at trial. The district court admitted all 192 prescriptions into evidence. Each patient testified as to their relationship with Dr. Katz and answered questions regarding their office visits with Dr. Katz. Each patient identified the prescriptions written for them by Dr. Katz and verified that they received the prescriptions from Dr. Katz. Thus, viewing the evidence in a light most favorable to the government, we consider it sufficient to support Dr. Katz's conviction.

Dr. Katz cites Tran Trong Cuong, 18 F.3d at 1132, in support of his sufficiency argument. However, Tran [**12] Trong Cuong is distinguishable, as that court based its holding of evidence insufficiency on the high percentage of counts that lacked patients to testify at trial. 18 F.3d at 1143. No patient testified as to 80 of the 136 counts in the indictment. Id. The court held that "[a] defendant is entitled to individual consideration of

every count in an indictment by the jury and evidence sufficient to convict on each count beyond a reasonable doubt, if he is to be convicted." Id. at 1142. In this case, every patient who received a prescription charged in the indictment testified, enabling the jury to consider each individual count in the indictment. For those reasons, we affirm [*1029] the district court's denial of Dr. Katz's motion for judgment of acquittal or for a new trial.

B. Admission of Evidence under Rule 404(b)

"We review the admissibility of evidence under Rule 404(b) for abuse of discretion. The district court had broad discretion in admitting such evidence and will be reversed only if 'such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts.'" United States v. Voegtlin, 437 F.3d 741, 745 (8th Cir. 2006) [**13] (quoting United States v. Thomas, 398 F.3d 1058, 1062 (8th Cir. 2005)) (internal citation omitted). "Rule 404(b) provides that evidence of prior crimes or acts, while inadmissible to prove that a person acted in conformity with the prior act, may be admissible for other purposes, such as 'proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" Id. (quoting Fed. R. Evid. 404(b)). Evidence is admissible under Rule 404(b) if it is (1) relevant to a material issue, (2) similar in kind and close in time to the crime charged, (3) proven by a preponderance of the evidence, and (4) if the potential prejudice does not substantially outweigh its probative value. Id. (quoting Thomas, 398 F.3d at 1062).

1. Admission of Prescriptions Not Charged in the Indictment

The government introduced evidence of at least 300 prescriptions that were not charged in the indictment but were written for patients who testified at trial. Dr. Katz argues that the mere fact that a prescription was written is not proof of wrongdoing. Dr. Katz asserts that the government introduced [**14] the uncharged prescriptions only to impress upon the jury the number of prescriptions that he wrote. The government, in response, contends that the prescriptions were relevant and admissible under Rule 404(b) as proof of knowledge and intent. The district court agreed and stated that the

> non-indicted prescriptions written to individuals named in the indictment appear relevant to the inquiry as to whether defendant had knowledge or intent to prescribe controlled substances to those individuals outside of the normal course of professional practice and without a legitimate medical purpose . . . the issuance of non-indicted prescriptions to the 'patients in question' does bear on defendant's treatment of those patients and is properly admitted under Rule 404(b).

We find no abuse of discretion in the district court's ruling. First, evidence is admissible under Rule 404(b) to show intent. In this case, a necessary element of the crime charged was whether Dr. Katz wrote the prescriptions for a legitimate medical purpose. Thus, the question of Dr. Katz's intent was central to the case and relevant to a material issue. Second, the prescriptions not charged in the indictment were [**15] similar in kind and close in time to the crime charged. Third, the prescriptions not charged in the indictment were proven by a preponderance of the evidence, as the patients to

whom they were written testified that they did indeed receive the prescriptions from Dr. Katz. Lastly, the admission of these other prescriptions was not unfairly prejudicial. For those reasons, the district court did not abuse its discretion in admitting the prescriptions not charged in the indictment under Rule 404(b). See United States v. Green, 428 F.3d 1131, 1134 (8th Cir. 2005) (holding that the defendant's substantial rights were not affected when the district court allowed nine victims to testify who were not specifically referenced in the indictment).

[*1030] 2. Admission of Testimony from Maria Taca

Dr. Katz argues that the district court abused its discretion in admitting the testimony of Maria Taca under Rule 404(b). He contends that the admission of Taca's testimony was intended solely to establish criminal propensity and tie him to a "drug smuggler." Dr. Katz submits that the prejudicial impact of Taca's testimony unquestionably outweighed what little probative value that it had. [**16] We find no abuse of discretion in the district court's ruling on the admission Taca's testimony under Rule 404(b). Taca's testimony was admitted to show Dr. Katz's knowledge and intent in writing these prescriptions in order to establish that he did not have a legitimate medical purpose in writing them.

Moreover, the testimony satisfies the four-factor test for the admissibility of Rule 404(b) evidence. The testimony was relevant to the material issue--whether Dr. Katz wrote these prescriptions outside the usual course of medical practice and without a legitimate medical purpose. The

government established by a preponderance of the evidence that Dr. Katz wrote the prescriptions for Taca. The potential prejudice did not substantially outweigh its probative value, and the other acts were similar in kind and close in time to the crime charged. Therefore, the district court did not abuse its discretion in admitting the testimony of Maria Taca.

C. Jury Instructions

"We review the district court's jury instructions for abuse of discretion, and this court will affirm if the instructions, taken as a whole, fairly and adequately submitted the issues to the jury. A district court has [**17] broad discretion in instructing the jury, and jury instructions do not need to be technically perfect or even a model of clarity." United States v. Garcia-Gonon, 433 F.3d 587, 591 (8th Cir. 2006) (internal citations and quotations omitted).

1. Rule 404(b) Instruction

Dr. Katz alleges that the district court gave a highly confusing instruction that did not tell the jurors how to properly consider the evidence admitted under Rule 404(b). The district court gave the following jury instruction for consideration of Rule 404(b) evidence:

You have heard evidence that the defendant, Harry Meyer Katz, previously committed acts similar to the ones charged in this case. You may not use this evidence to decide whether defendant Katz carried out the acts involved in the crimes charged here. However, if you are convinced beyond a reasonable doubt, based on other evidence introduced, that defendant Katz did carry out the acts involved in the crimes charged here, then you may use this evidence

concerning previous acts to decide whether he knowingly and intentionally distributed controlled substances without a legitimate medical purpose and outside the scope of professional [**18] practice.

Remember, even if you find that defendant Katz may have committed a similar act in the past, this is not evidence that he committed such an act in this case. You may not convict a person simply because you believe he may have committed similar acts in the past. Defendant Katz is on trial only for the crimes charged, and you may consider the evidence of prior acts only on the issue of intent and knowledge.

After review of this jury instruction, we find Dr. Katz's argument without merit. The instruction, as given by the district court, fairly and adequately submitted the issue to the jury and was not confusing.

[*1031] 2. "Willful Blindness" Instruction

Dr. Katz claims that the district court's willful blindness instruction invited the jury to convict him using negligence principles and that the district court abused its discretion in giving the instruction. Dr. Katz asserts that no evidence was adduced at trial that he intentionally avoided information that would have had a high probability of revealing any improper motives on the part of his patients. In fact, the government's expert testified that a doctor should believe his or her patients unless given a reason not [**19] to.

On the other hand, the government argues that a willful blindness instruction was appropriate. The government highlights evidence showing that Dr. Katz ignored many warning signs and red flags and consciously eschewed performing the most

rudimentary screening that would have revealed many of his patients' ruses. Dr. Katz sought no patient medical history and never ordered diagnostic or laboratory tests for any of the patients who testified, and he prescribed identical controlled substances to members of the same family. He also provided patients access to controlled substances by routinely refilling 30-day prescriptions when only two weeks had expired.

"A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance. Ignorance is deliberate if the defendant was presented with facts that put her on notice that criminal activity was particularly likely and yet she intentionally failed to investigate those facts." United States v. Florez, 368 F.3d 1042, 1044 (8th Cir. 2004) (internal citations and quotations omitted). The evidence is sufficient to support the instruction [**20] if a reasonable jury could conclude beyond a reasonable doubt that the defendant either had actual knowledge of the illegal activity or deliberately failed to inquire about it before taking action to support it. Id. "If, in light of certain obvious facts, reasonable inferences support a finding that a defendant's failure to investigate is equivalent to 'burying one's head in the sand,' the jury may consider willful blindness as a basis for knowledge." Id. In this case, the government adduced ample evidence to support the giving of a "willful blindness" instruction, including testimony from several patient/witnesses that they obtained 30-day prescriptions for controlled substances every two weeks for several years. Accordingly, the district

court did not abuse its discretion in instructing the jury on willful blindness.

D. Expert Testimony

Dr. Katz urges that under Federal Rule of Evidence 704(b), Dr. Parran, the government's expert witness, should not have been allowed to testify regarding Dr. Katz's mental state under the subjective prong of the test for criminal liability under § 846. Dr. Parran testified at length regarding his opinions [**21] of the standard of care to be followed by physicians in treating persons suffering from pain or anxiety. Dr. Parran also testified, after reviewing the medical records of four of Dr. Katz's patients, that the prescriptions written for these patients "[did] not appear to have been for a legitimate purpose." Dr. Katz further contends that the district court erred in allowing Dr. Parran to testify that a doctor who did not follow the standards of care in diagnosis could not have a legitimate medical purpose to write a prescription. Dr. Katz claims that Dr. Parran's testimony, in effect, lowered the government's burden of proof to a mere negligence standard, giving the jury license to convict him if it found his prescription methodology differed from Dr. Parran's methodology.

"We review the district court's evidentiary rulings for abuse of discretion." [*1032] United States v. Urbina, 431 F.3d 305, 311 (8th Cir. 2005). Upon review, we find Dr. Katz's argument unpersuasive. First, Rule 704(b) "prohibits experts from stating an opinion as to whether the defendant had the requisite mental state for the crime charged . . . ." Id. However, Dr. Parran did not testify regarding [**22] the subjective mental state of Dr. Katz upon writing the prescriptions charged in the indictment.

In fact, during cross-examination of Dr. Parran, defense counsel asked Dr. Parran on three occasions whether he was purporting to express an opinion as to what Dr. Katz might have had in his mind at the time that he wrote the prescriptions at issue in the indictment. Each time that he was asked, Dr. Parran denied doing so. The district court's admission of this testimony did not run afoul of Rule 704(b).

Second, Dr. Parran's testimony tying standards of care to the existence of a legitimate medical purpose to write a prescription was admissible. "[A] court can allow opinion testimony if the expert's specialized knowledge is helpful to the jury to understand the evidence or determine a fact in issue, even if the opinion embraces an ultimate issue to be decided by the jury." Id. (quoting United States v. Brown, 110 F.3d 605, 610 (8th Cir. 1997) (internal quotations omitted). Lastly, the government's burden of proof was not lowered to a negligence standard after Dr. Parran's testimony. The district court instructed the jury that they must find beyond a reasonable doubt [**23] that Dr. Katz wrote prescriptions outside the scope of medical practice and not for a legitimate medical purpose. Further, the jury was specifically instructed that mere negligence could not support a conviction for criminal conduct. As a result, the district court did not abuse its discretion in admitting Dr. Parran's expert testimony.

E. Prosecutorial Misconduct

Dr. Katz states that it was improper for the Assistant United States Attorney ("AUSA"), in his rebuttal closing argument, to compare him, unfavorably, to "a rogue's gallery of notorious drug criminals while extensively lauding the agents of the

Drug Enforcement Administration." n5 According [*1033] to Dr. Katz, upon his objection, the district court merely said "let's get back on track" and let the government resume its "harangue." Dr. Katz suggests that the AUSA improperly attempted to pander to African-American jurors by comparing him to heroine pushers that victimized people in Harlem. In sum, Dr. Katz argues that there was no probative value to these comments; they were intended to prejudice the jury against him. Consequently, Dr. Katz states the AUSA's comments affected the outcome of the trial. The government contends [**24] that during rebuttal closing argument, it discussed the "moral reasonableness" of finding Dr. Katz guilty of his crimes. In doing so, the AUSA contrasted Dr. Katz's crimes with more classic drug offenses with which the jury might be familiar though the mass media. The government asserts that it sought to remind the jury that Dr. Katz was no less guilty simply because he holds a medical degree and operates out of an office rather than on a street corner.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n5 The AUSA stated the following in his rebuttal closing argument:

There's a war on drugs and the DEA fights it every day. Think about that for a minute with me. It has a history of its own, going all the way back to post World War II, the heroine scourge. And it hit big cities like New York and it rooted in the ghettos, places like Harlem. And think about the history of what heroine did to Harlem in post World War II and then fast forward a decade or so to the 60s and the counterculture movement; sex, drugs, and rock and

roll. Tune in, turn on, and drop out. It became the mantra of an entire generation. It was rooted in the Height Ashbury District in San Francisco in the 70s and early 80s in cocaine, powder cocaine. That war was fought in the discotheques and the nightclubs and it reached all the way up to the social elite and the famous and the wealthy. Still, movie actors and rock stars. And then came the 80s and the retardation of cocaine, crack cocaine. And it became a poor man's addiction. And then the 90s with methamphetamine and designer drugs like Ecstacy. There's a crazy logic to it all. They all start out in some exotic locale, the coca fields of Afghanistan for heroine or for cocaine in Brazil--I'm sorry. The poppy fields in Afghanistan for heroine. Mexican superlabs for the methamphetamine that makes it across the border. The tropics of the world for the world's strongest and most potent marijuana. And it all comes to America through some port city. It's Miami, it's New York, it's L.A., it's San Francisco or it sneaks across the border across the Rio Grande and they make it to America. And from there, from those port cities, it hopscotches its way across the United States to the big cities, to the medium cities, to the small towns. And that war is fought on a daily basis by DEA special agents. And it's probably easy to be a member of that chain somewhere down the line where either the farmer in the poppy field or the cartel leader in Brazil or the smuggler that gets it into the United States or the mule that transports it to the Midwest or the distributor on the street corner who sells it. Because no one along that chain has to see the entire picture in carnage that's left behind. No one has to stand face-to-face with that.

[Dr. Katz objected at this point; the district court overruled the objection, but instructed the government to "get back on track."]

But what do we have here? What do we have here? This man is different than the war on drugs you're familiar with from TV. He is licensed, his is educated, he is trained, and he is experienced. And for all of that he is trusted by all of us who are not those things. He is doctor. But when Mike Otten, Dawn Molkenbur, Cindy Scott, Mr. And Mrs. Marlow, Charles Beck, Dan Seay, the Ashers, Bill Bradley, Danny Turman, and all four of the Bowen family walk into the office and need something from the doctor, they tell him what they want, he does not tell them what they need. When you tell the doctor what you want and he gives it to you without questions asked, that's Doctor Feel Good, that's not Dr. Katz. This doctor is no more than a drug dealer. He has an office instead of a street corner. Do we put a DEA diversion agent in every doctor's office now? We can't. How do we fight convenience doctors, drug dealers? You do. It's not good faith. There is not one scintilla of evidence that this man was acting in good faith. It's more of this. I don't care, here's your prescription . . . .

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

- [**25] "The trial court has broad discretion in controlling the direction of opening statements and closing arguments, 'and this court will not reverse absent a showing of abuse of discretion.'" United States v. Conrad, 320 F.3d 851, 855 (8th Cir. 2003) (quoting United States v. Johnson, 968 F.2d 768, 769 (8th Cir. 1992)). "On appeal, we review the facts of each case in order to determine if the prosecutor's remarks unduly prejudiced the defendant's

opportunity for a fair trial. We will reverse the conviction if we conclude the jury's verdict could reasonably have been affected by the prosecutor's improper comments." Id. (internal citations omitted).

This court has established a two-part test for reversible prosecutorial misconduct: (1) the prosecutor's remarks or conduct must have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial. We employ the following three factors to determine the prejudicial effect of prosecutorial misconduct: (1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of [**26] the defendant's guilt; and (3) the curative actions taken by the court.

Id. (internal quotations and citations omitted).

We agree with Dr. Katz that the comments made by the AUSA during his rebuttal closing argument were improper. [*1034] The comments "had little or no probative value on any issue at trial;" they "did not relate to an element of the offense nor did the comments aid the fact finder." Id. However, we cannot say that the AUSA's remarks prejudicially affected Dr. Katz's substantial rights so as to deprive him of a fair trial. First, examining the cumulative effect of the misconduct, we note that the AUSA's comments were limited to one phase of the trial--closing arguments. Cf. Conrad, 320 F.3d at 855-56 (finding that the prosecutor made improper comments throughout the trial, including in his opening statement, during direct examination of witnesses, and during his closing argument). Second, the evidence presented against Dr. Katz was substantial in that it included the testimony of 15

patient/witnesses, regarding more than 400 prescriptions. Lastly, from a review of the record, it appears that Dr. Katz only made one objection during the government's [**27] rebuttal closing argument and did not request a curative instruction. The district court overruled Dr. Katz's objection, but warned the AUSA to "get back on track." Thus, in light of the abundant evidence presented supporting the jury's guilty verdict and the fact that the improper comments were limited to the rebuttal closing argument, we find that the government's improper comments made during rebuttal closing argument did not prejudicially affect Dr. Katz's substantial rights so as to deprive him of a fair trial.

F. Mistrial

Finally, Dr. Katz contends that the district court erred in failing to grant a mistrial after a government witness, Chad Asher, twice disclosed to the jury that Dr. Katz had been disciplined by state licensing authorities, which violated the district court's pretrial order. Dr. Katz argues that disclosure of the disciplinary action against him confused the jury and encouraged it to convict him based on this irrelevant and inadmissible fact. Dr. Katz declined a curative instruction, deciding not to call more attention to the impermissible testimony. Dr. Katz argues that the jury would likely view testimony of his professional discipline as highly probative, [**28] confirming in their minds that the state authorities also believed that he behaved improperly. For those reasons, Dr. Katz asks this court to find that the denial of a mistrial was an abuse of discretion.

The government states that the district court characterized Asher's comments as an "isolated incident." The government submits that Asher was

one of 17 witnesses who testified over a period of 5 days, and the objectionable testimony came in the form of two brief comments, which were quickly interrupted and not exploited in any way. Thus, the government maintains that it is highly unlikely that these two comments from Chad Asher had any significant impact on the jury.

"The standard of review of a denial of a motion for a mistrial is abuse of discretion. The prejudicial effect of any improper testimony is determined by examining the context of the error and the strength of the evidence of the defendant's guilt." United States v. Hollins, 432 F.3d 809, 812 (8th Cir. 2005) (internal citation omitted). "The district court is in a far better position to measure the effect of an improper [answer] on the jury than an appellate court which reviews only the cold record. [**29] " Id. (internal quotations and brackets omitted). The two objectionable portions of Chad Asher's testimony are as follows:

> A. I called him and told him I had an extremely bad tooth ache, and -
>
> Q. Let me stop you right there. Was that true the first time?
>
> A. Yeah, it was.
>
> Q. And what happened?
>
> [*1035] A. I recall at that time he was having - - he was in trouble - - his license - -
>
> Q. I don't want to ask you about any of that, just when you went to the office what happened?
>
> * * *
>
> Q. Did it ever work?

A. There were a few instances where I did see him like after 12 days instead of 14. It was supposed to be 14, but then I think he ran into a little trouble with his license - -

Q. Mr. Asher, wait, wait, wait. I just want to talk about the times that you saw him before the 14 days expired. Did you have a conversation with Dr. Katz about that, did he realize you were there early?

Considering the numerous witnesses called to testify in this matter and the amount of evidence presented against Dr. Katz, we conclude these two unsolicited statements in possible violation of the district court's pretrial order were not sufficient to warrant the [**30] drastic remedy of mistrial. United States v. Cole, 380 F.3d 422, 427 (8th Cir. 2004) ("In the face of the strong evidence and wide array of testimony against Cole, one objectionable statement by a prosecution witness was not sufficient to create prejudicial error."). Therefore, the district court did not abuse its discretion in denying Dr. Katz's motion for a mistrial.

III. Conclusion

For those reasons stated above, Dr. Katz's conviction is affirmed.

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APPENDIX E
JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI DATED 12-7-09

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 4:07CV1454-DJS

HARRY MEYER KATZ,
Movant,
vs.
UNITED STATES OF AMERICA,
Respondent.

ORDER

On March 15, 2005, following a six-day trial before this Court, a unanimous jury found movant Harry Meyer Katz guilty on Counts 1-6, 17-160, and 162-192 of the 192-count Superseding Indictment.[1] He was sentenced on June 30, 2005, to sixteen months imprisonment, two years of supervised release, a $75,000.00 fine, and a $17,600.00 special assessment. Movant filed a direct appeal, raising seven grounds of alleged error.[2] On May 9, 2006, the

----------Start Footnote----------

1 Movant, who at the time of the charged offenses was a registrant authorized to dispense controlled substances, was charged in the Superseding Indictment with 192 counts of violating 21 U.S.C. §841 (a) (1) , that is, six counts of attempting to dispense and 186 counts of dispensing a controlled substance outside the scope of professional practice and not for a legitimate purpose.

2 Movant advanced the following arguments on direct appeal: (1) the Court erred in failing to grant his motion for judgment of acquittal or a new trial based on the sufficiency of the evidence; (2) the Court

erred in admitting evidence relating to prescriptions not charged in the indictment; (3) the Court erred in admitting Rule 404 (b) testimony; (4) the Court gave erroneous jury instructions; (5) the Court erred in allowing disputed portions of testimony from the government's expert to be submitted to the jury; (6) the government's rebuttal closing argument deprived him of a fair trial; and (7) the Court erred in failing to grant a mistrial following the inappropriate testimony of Chad Asher.

----------End Footnote----------

Eighth Circuit Court of Appeals denied movant's direct appeal. United States v. Katz, 445 F.3d 1023 (8th Cir. 2006). A petition for Writ of Certiorari was filed with the United States Supreme Court, and that petition was denied on October 10, 2006. Now before the Court is the motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255 [Doc. #1].[3] Movant raises five grounds for relief.

Habeas Grounds

Movant raises the following five grounds for relief pursuant to §2255:

Ground 1: Movant alleges that trial counsel was ineffective during the pretrial and trial processes because he failed to move for dismissal of the indictment or a judgment of acquittal based on outrageous government conduct.

Ground 2: Movant alleges that trial counsel was ineffective during the trial process when he failed to investigate, interview, or present available expert witnesses and documentary

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3 Since the filing of his §2255 motion, movant' s term of incarceration has expired. Although the

government has not questioned this Court's jurisdiction to continue to entertain movant's motion, movant argues that his motion is not moot due to the collateral consequences of his conviction, namely, the loss of his ability to practice medicine. Doc. #11-2. The Court herein finds that it does have jurisdiction. See *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968) ("In consequence of [movant's] conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these disabilities or burdens which may flow from petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. On account of these collateral consequences, the case is not moot." (internal quotations omitted)).

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evidence to rebut and refute the testimony of the government's expert, Dr. Theodore Parran.

Ground 3: Movant alleges that trial counsel was ineffective during the trial process when he failed to call the attention of the jury or the Court to the absence of any evidence of movant's "intent" to violate the narcotics laws.

Ground 4: Movant alleges that trial counsel was ineffective due to the cumulative impact of multiple deficiencies or errors by trial counsel during the pretrial, trial, and direct appeal processes.

Ground 5: Movant alleges that he was denied due process of law in the trial process when he was convicted and sentenced because of his actual innocence.

Discussion

Movant's first three grounds for relief offered in his §2255 motion are specific claims of ineffective assistance of counsel, and Ground Four generally asserts an ineffective assistance of counsel claim due to the cumulative impact of the multiple deficiencies or errors by trial counsel. To prevail on a claim of ineffective assistance of counsel, movant must show that his counsel's performance was deficient as a matter of constitutional law and that movant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A constitutionally deficient performance is one that falls "outside

the wide range of professionally competent assistance." Id. at 690. A defendant is prejudiced by deficient performance if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. In order to prevail on an ineffective assistance of counsel claim, a petitioner must show that: (1) his trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence; and (2) the deficient performance prejudiced petitioner's defense.

> Under the first element, there is a strong presumption that counsel's conduct falls within the wide range of professionally reasonable assistance and sound trial strategy. Assuming that counsel's performance has been deficient, the second element of prejudice requires a reasonable probability that, but for a counsel's

unprofessional errors, the result of the proceeding would have been different.

Toledo v. United States, 581 F.3d 678, 680 (8th Cir. 2009) (internal quotations omitted). "Judicial scrutiny of counsel's performance is highly deferential, indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional judgment." *United States v. Martinez-Salinas*, 573 F.3d 595, 599 (8th Cir. 2009) (quotation omitted). Regarding the second element, when determining if prejudice exists, "the court must consider the totality of the evidence before the judge or jury." *Williams v. United States*, 452 F.3d 1009, 1013 (8th Cir. 2006) (quotation omitted). "If the defendant cannot prove prejudice, [a court] need not address whether counsel's performance

was deficient." *DeRoo v. United States*, 223 F. 3d 919, 925 (8th Cir. 2000). A movant faces a "heavy burden" to establish ineffective assistance of counsel in the context of a §2255 motion. *United States v. Apfel*, 97 F.3d 1074, 1077 (8th Cir. 1996).

In Ground One, movant contends that counsel was ineffective for failing to move for dismissal of the indictment or a judgment of acquittal based on outrageous government conduct. More specifically, movant states that evidence used to persuade the grand jury to indict movant included the false statement of Agent William Stockman (of the Drug Enforcement Agency), to Francis Corona (the investigator for the Missouri Board of Healing Arts), that "anyone could walk into Dr. Katz 's office and get anything for $40 and there would be no request for medical information and there would be no examination because there was no examination table

in his office." Movant argues this statement was patently false, because evidence of patients who were denied prescriptions unequivocally existed, and that such evidence demonstrated the falsity of Agent Stockman's statement. Doc. #1, p. 34.

The government responds to Ground One by arguing, among other points, that this alleged perjury is not perjury at all. Rather, the government argues that stating "anyone" could get "anything" amounted to an idiomatic expression which meant that there was so little adherence to acceptable medical practice that virtually anyone could get anything they wanted. The government acknowledges that some persons were denied controlled substances,

but argues that the evidence presented to the grand jury and the petit jury demonstrated that persons who were refused were so few and far between that the phrase had a ring of truth to it. Further, the government argues that the claim that Agent Stockman's grand jury testimony was false is largely irrelevant because the jury's guilty verdict obviates any claims of wrongdoing in the grand jury proceedings. See *United States v. Adams*, 401 F.3d 886, 900 (8th Cir. 2005) ("[E]ven if we were to assume there was prosecutorial misconduct during the grand jury proceedings, the petit jury's guilty verdict rendered those errors harmless." (quotation omitted)).

The Court finds the government's arguments persuasive. Specifically, the Court agrees that Agent Stockman's statement that "anyone" could get "anything" is not rendered false or properly cast as perjury because evidence that movant refused a few

people controlled substances existed. Rather, the Court agrees with the government that Agent Stockman's statement utilized an idiomatic expression which communicated an accepted meaning of the words he employed. The Court therefore rejects the legal argument counsel failed to make, and, accordingly, the Court readily concludes that counsel's performance was not deficient for failing to assert such an argument.[4] Furthermore, the guilty verdict of the petit jury

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4 Movant also argues, in his reply brief, that had Agent Stockman's perjury to the grand jury been presented to the petit jury, doubt would have been cast on his trial testimony. However, as the Court above finds that Agent Stockman's statement utilized an idiomatic expression and

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makes "any error in the grand jury proceeding connected with the charging decision 'harmless beyond a reasonable doubt.'" *United States v. Dugan*, 150 F.3d 865, 868 (8th Cir. 1998) (quoting *United States v. Mechanik*, 475 U.S. 66, 70 (1986)) . The Court rejects Ground One as an avenue to the relief movant seeks.

In Ground Two, movant asserts that his trial counsel did not investigate, interview, or present available expert witnesses and documentary evidence to rebut and refute the testimony of the government's expert, Dr. Parran. Movant argues that extensive evidence existed to rebut and conclusively refute the testimony of Dr. Parran, and that his trial counsel should have but did not investigate this evidence, much less use it at trial. To support his

claim of prejudice, movant has submitted the expert evidence of Ms. Carole Zikowski, Dr. Melissa Swallow, and Dr. Donald Beam.

The government responds to Ground Two by arguing that the evidence obtained from these expert witnesses only marginally refutes Dr. Parran's testimony, and therefore such evidence would not have impacted the outcome of the trial. Further, the government argues that there is no indication that the expert affidavits produced by movant would ever have withstood Dr. Parran's testimony, much less the prosecution's cross examination.

The government also outlines the expert-witness investigation trial counsel did undertake. This investigation

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therefore he committed no perjury, movant's argument is unpersuasive.

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included Dr. Richard Lewan, who, after reviewing the medical records from movant's practice, concluded that the sufficiency of the records, both as a general matter of record keeping and as a basis for prescribing controlled substances, was overwhelmingly negative to movant, and that Dr. Lewan's opinions tracked those of Dr. Parran's in most respects. Trial counsel's investigation also included Dr. Walker, who declined to testify because she was movant's treating physician. Trial counsel's investigation also included Dr. William Sunderwirth, who was ultimately deemed not to be a good witness because he was under investigation by the Missouri Board of Registration for the Healing Arts. Finally, submitted by the government is trial counsel's

statement that he proposed to movant (and movant endorsed) the strategy of having movant serve as the expert, to attempt the juxtaposition of his status as a Missouri physician practicing alone in a small town with the big city professor imported from Ohio by the government.

The Court has reviewed the exhibits submitted with movant's §2255 motion and, considering the totality of the evidence, finds no showing of a reasonable probability that, but for trial counsel's alleged errors, the result of movant's trial would have been different. The Court is persuaded by the government's assertion that the evidence contained in the affidavits submitted by movant, at best, marginally refutes the government's expert. Indeed, the Court notes that much of what is contained in movant's submitted affidavits fails in any relevant

manner to controvert the testimony given by Dr. Parran on direct examination or on cross examination. Therefore, movant fails to show he was prejudiced by counsel's failure to procure such evidence. Because movant fails to show prejudice, the Court need not address whether trial counsel's performance in procuring expert testimony was deficient. See *Apfel*, 97 F.3d at 1076 ("Because the failure to establish prejudice can be dispositive of a case, we need not address the reasonableness of the attorney's behavior if the movant cannot prove prejudice." (internal citation omitted)). Nevertheless, the Court notes that, in view of counsel's reasonable investigation and the strategic decision in which movant himself joined, movant cannot persuasively base an ineffective assistance claim on trial counsel's

failure to investigate or present another expert witness. In light of the fact that movant fails to establish prejudice, and also fails to make a showing of deficient performance by his trial counsel, Ground Two is found to be without merit.

Movant asserts in Ground Three that he was prejudiced by the objectively unreasonable performance of trial counsel when trial counsel failed to call the attention of the jury and the Court to the absence of any evidence of "intent" to violate the narcotics laws. Movant argues that the intent of movant to violate the narcotics laws was never established, and that trial counsel should have but did not object to the sufficiency of the evidence.

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The government responds to Ground Three by stating that movant's contention that trial counsel failed to object to the sufficiency of the evidence that he possessed the requisite intent has already been argued, appealed, and denied. The government argues that despite movant's attempt to couch Ground Three in new terminology, in reality, trial counsel objected to the use of a "willful blindness" instruction and appealed this instruction all the way to the United States Supreme Court. The government argues that since trial counsel did oppose the "willful blindness" instruction, failure to argue intent cannot now serve as a basis for an ineffective assistance of counsel claim.

With regard to the issue of intent, the Court is persuaded that the "willful blindness" instruction allowed the jury to infer that (to the extent movant did lack actual knowledge) the evidence indicated that he closed his eyes to the numerous warnings which would have made him aware of the fact that

there were no legitimate medical purposes for the prescriptions which were the bases of the counts of conviction. That is, the jury could find that movant was presented with facts that put him on notice that criminal activity was particularly likely and yet he intentionally failed to investigate those facts. The Eighth Circuit affirmed the use of the "willful blindness" instruction in this case. See *Katz*, 445 F.3d at 1031 ("A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance.... If, in

light of certain obvious facts, reasonable inferences support a finding that a defendant's failure to investigate is equivalent to burying one's head in the sand, the jury may consider willful blindness as a basis for knowledge.... [T]he district court did not abuse its discretion in instructing the jury on willful blindness." (internal quotations omitted)). Accordingly, the Court finds that the issue of movant's knowledge or intent, specifically the "willful blindness" instruction, has already been litigated and rejected by the Eighth Circuit. As movant's argument is predicated on a proposition that has been rejected by the Eighth Circuit,[5] the Court finds Ground Three to be without merit.

Movant asserts in Ground Four that he was prejudiced by the multiple deficiencies of trial counsel, and that, even in cases where there is no single error that would be sufficient to support a finding of prejudice, prejudice may result from the cumulative impact of such deficiencies. Movant argues that, through the deficiencies set forth in the

"foregoing arguments" (that is, those deficiencies outlined in Grounds One, Two, and Three), counsel's

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5 The Court notes that movant, in his reply brief, argues that the basis for Ground Three is not a substantive claim of an improper jury instruction, but rather a claim of ineffective assistance of counsel predicated on trial counsel's failure to argue the absence of intent to violate narcotics laws. However, movant's argument is not well taken. Instructions 19 and 20 informed the jury that, as an element of the crimes charged, it must find that movant acted intentionally or knowingly. Instruction 17 informed the jury that it may find that movant acted knowingly (thereby satisfying the above mentioned element of Instructions 19 and 20) if he was willfully blind to the illegality of his activity. To now suggest that trial counsel failed to argue a lack of evidence of intent ignores or implicitly opposes the willful blindness instruction that stated the requisite knowledge could be inferred.

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performance was below the objective standard required by the Constitution, and that movant was clearly prejudiced by the cumulative impact of these deficiencies.

To the extent movant relies on the deficiencies alleged in Grounds One, Two, and Three, since the Court above finds little or no prejudice, the Court is not persuaded that the cumulative effect of these alleged deficiencies resulted in prejudice sufficient to vacate movant's conviction. To the extent movant relies on deficiencies not specifically set forth in his §2255 motion, the Court finds that movant's lack of

specificity and evidentiary support defeats this claim. Ground Four is therefore found to be without merit.

Finally, movant asserts in Ground Five that his conviction and sentence are violative of his Fifth Amendment constitutional right to due process of law because new evidence demonstrates his actual innocence. Movant states that he has presented new competent evidence (the evidence submitted to support the claim asserted in Ground Two) that he is actually innocent. Further, movant states that other evidence of his innocence exists, including the transcript testimony of Dr. James Campbell given in United Stated v. Hurwitz, and the plea agreement in *United States v. The Purdue Frederick Company* and a related CNN news article. Movant argues that the Court is therefore mandated to adjudicate movant's constitutional claim presented in this motion under the "ends of justice" or "actual innocence" exception to "procedural

bar." Doc. #1, p. 90. Movant also argues that he was denied due process of law when he was convicted and sentenced for crimes for which no "intent" exists. Doc. #1, p. 91.

The government responds to Ground Five by asserting that, in order for movant to maintain successfully a procedurally barred argument, he must show that his conviction was "probably" based on the violation of his due process rights. The government argues that movant' s new expert witness affidavits are inconclusive and do not offer any new relevant evidence of his innocence. Further, the government argues that the question of movant's intent, possibly inferred by the jury through the

willful blindness instruction, has already been thoroughly litigated by this court, the Eighth Circuit, and denied certiorari by the United States Supreme Court. Accordingly, the government asks this Court to deny movant the relief he seeks.

The actual innocence exception applies to claims of factual, not legal, innocence. *Anderson v. United States*, 25 F.3d 704, 707 (8th Cir. 1994) . Furthermore, "[i]n order to pass through the actual innocence gateway ... a petitioner must support his claim of innocence with reliable new evidence, whether exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." *Amrine v. Bowersox*, 128 F.3d 1222, 1228 (8th Cir. 1997) (citing *Schlup v. Delo*, 513 U.S. 298, 322-24 (1995)). The evidence now offered must be "new" in the sense that it was wrongly excluded at petitioner's

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trial or only discoverable afterward. See, e.g., *Schlup*, 513 U.S. at 315; *Kuhlmann v. Wilson*, 477 U.S. 436, 454-55 n.17 (1986) (plurality opinion); *Battle v. Delo*, 64 F.3d 347, 352 (8th Cir. 1995) .

To the extent movant bases his argument on the newly offered expert testimony, the Court finds above that the expert affidavits and medical records offered by movant fail to controvert the testimony given by the government's expert in any relevant manner, and therefore do not constitute evidence of his innocence. Moreover, as stated above, the Court finds that the inference allowed by the jury through the "willful blindness" instruction has already been litigated by the Eighth Circuit and movant's argument has been rejected. See *Katz*, 445 F.3d at

1031. The Court therefore rejects movant's assertion claiming actual innocence.

For the foregoing reasons,

IT IS HEREBY ORDERED that the motion of Harry Meyer Katz to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255 [Doc. #1] is denied.

Dated this 7th day of December, 2009.

/s/Donald J. Stohr

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 4:07CV1454-DJS

HARRY MEYER KATZ,
Movant,
vs.
UNITED STATES OF AMERICA,
Respondent.

JUDGMENT

Pursuant to the order entered herein this day,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the instant motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255 is denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that no certificate of probable cause to appeal or certificate of appealability shall issue from this Court.

Dated this 7th day of December, 2009.

/s/Donald J. Stohr

UNITED STATES DISTRICT JUDGE

APPENDIX F
JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI DATED 12-7-09

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 4:07CV1454-DJS

HARRY MEYER KATZ,
Movant,
vs.
UNITED STATES OF AMERICA,
Respondent.

JUDGMENT

Pursuant to the order entered herein this day,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the instant motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255 is denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that no certificate of probable cause to appeal or certificate of appealability shall issue from this Court.

Dated this 7th day of December, 2009.
/s/Donald J. Stohr
UNITED STATES DISTRICT JUDGE

APPENDIX G
ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING REHEARING ON DIRECT APPEAL DATED 6-15-06

2006 U.S. App. LEXIS 14744, *
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States of America,
Appellee,
vs.
Harry Meyer Katz,
Appellant.
No. 05-2940
2006 U.S. App. LEXIS 14744
June 15, 2006, Decided

OPINION: Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 15, 2006

APPENDIX H
SUPREME COURT ORDER DENYING CERTIORARI ON DIRECT APPEAL DATED 10-10-06

Harry M. Katz, Petitioner v. United States.

No. 06-339.

SUPREME COURT OF THE UNITED STATES

127 S. Ct. 421; 166 L. Ed. 2d 275; 2006 U.S. LEXIS 7562; 75 U.S.L.W. 3195

October 10, 2006, Decided

PRIOR HISTORY: United States v. Katz, 445 F.3d 1023, 2006 U.S. App. LEXIS 11462 (8th Cir. Mo., 2006)

JUDGES: [*1] Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito.

OPINION: Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.